In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 133

UNITED STATES OF AMERICA, APPELLANT

v.

THIRTY-SEVEN (37) PHOTOGRAPHS, MILTON LUROS, CLAIMANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

The following portions of the record appear herein in chronological sequence:

409-568 O—70——1

RELEVANT DOCKET ENTRIES

The complaint for forfeiture dated November 5, 1969, and filed November 6, 1969

The answer and counterclaim dated November 13, 1969, and filed November 14, 1969

The notice of motion to convene a three-judge court dated November 13, 1969, and filed November 14, 1969

Stipulation of parties as to when motion to convene a three-judge court may be heard dated November 13, 1969, and filed November 14, 1969.

Order continuing the hearing on the motion to convene a three-judge court dated November 17, 1969, and filed the same date

Order granting the convening of a three-judge court dated November 18, 1969, and filed on the same date

Stipulation of parties as to filing dates for briefs dated November 18, 1969, and filed November 20, 1969

Order of three-judge court directing the matter submitted dated January 9, 1970, and filed on the same date

United States District Court Central District of California

Civil No. 69-2242F

UNITED STATES OF AMERICA, PLAINTIFF

v.

THIRTY-SEVEN (37) PHOTOGRAPHS, DEFENDANT

COMPLAINT FOR FORFEITURE

For its claims against the defendant photographs, the United States of America alleges as follows:

I.

That this Court has jurisdiction under 28 U.S.C. § 1345 and 19 U.S.C. § 1305.

II.

That on October 24, 1969, the defendant photographs were brought into the United States by Milton Luros.

III.

That the defendant photographs are obscene which fact makes the defendant photographs subject to seizure and forfeiture under the provisions of 19 U.S.C. § 1305.

IV.

That on October 24, 1969, the defendant photographs were seized by duly authorized Customs Agents in Los Angeles, California, within the jurisdiction of this Court.

V.

That the defendant photographs are in the possession of the United States Attorney's Office, United States Court House, Room 1127, 312 North Spring Street, Los Angeles, California, 90012, or elsewhere within the jurisdiction of this Court.

WHEREFORE, the United States prays that due process issue to enforce the forfeiture of the defendant photographs and that due notice of these proceedings be given to all interested parties.

WM. MATTHEW BYRNE, JR.,
United States Attorney.
FREDERICK M. BROSIO, JR.,
Asst. U.S. Attorney
Chief, Civil Division.
LARRY L. DIER,
Asst. U.S. Attorney,
Attorneys for Plaintiff,
United States of America.

United States District Court Central District of California

Civil No. 69-2242-F

UNITED STATES OF AMERICA, PLAINTIFF

v.

THIRTY-SEVEN (37) PHOTOGRAPHS, DEFENDANTS

MILTON LUROS, CLAIMANT

ANSWER AND COUNTER-CLAIM

COMES NOW the defendants and claimant, and allege as follows:

I

Denies that the photographs mentioned in Paragraph III of the Complaint are obscene and, in this connection, allege that the said photographs were to be part of the ancient and highly acclaimed book *The Kama Sutra of Vatsyayana*, which book has been distributed widely throughout the Nation, and which book has been acclaimed as a work of great value. The photographs are part and parcel of the said work, and integral to the book. The photographs independently and as part of the contemplated book plainly have social value, and appeal only to the normal curiosity the average person has in matters pertaining to sex, and do not appeal to the prurient interest of the average person in the Nation as a whole. Moreover, the said photographs independently and as part of the contemplated book are within customary limits of candor in the Nation as a whole. Heretofore, Customs has passed like works which are generally circulating throughout the Nation.

AFFIRMATIVE DEFENSE

II

The Court lacks jurisdiction because the statute under which the Complaint was brought, Title 19 U.S.C. 1305, is, on its face and as construed and applied, unconstitutional, null and void for the following reasons:

A. It violates rights guaranteed to the defendants and claimant under the free speech and press and due process provisions of the First and Fifth Amendments to the United States Constitution, in that it purports to exclude from the United States photographs to be used in a book limited to sale to adults and advertised in a tasteful fashion which will not invade the sensibilities or privacy of the general public.

B. It violates the rights guaranteed to the defendants and claimant under the free speech and press and due process provisions of the First and Fifth Amendments to the United States Constitution, in that it fails to provide adequate procedural safeguards against undue suppression of protected expression by failing to provide for speedy judicial determination.

C. It violates rights guaranteed to the defendants and claimant under the free speech and press and due process provisions of the First and Fifth Amendments to the United States Con-

stitution, in that it purports to authorize Customs to condemn a work as obscene without notice or adversary proceedings.

D. It violates the rights guaranteed to the defendants and claimant under the free speech and press and due process provisions of the First and Fifth Amendments to the United States Constitution, in that it purports to authorize the seizure of photographs upon mere probable cause, without evidence that the photographs are obscene, and in the face of evidence that they are not obscene.

E. It violates rights guaranteed to defendants and claimant under the free speech and press and due process provisions of the First and Fifth Amendments to the United States Constitution, in that it is void for vagueness.

COUNTER-CLAIM

III

This Court has jurisdiction over this Counter-Claim pursuant to Rule 13 of the Federal Rules of Civil Procedure. The jurisdiction of this Court is also invoked under 19 U.S.C. § 1305; and 28 U.S.C. §§ 1331, 1345, 2201, 2202, 2282 and 2284.

IV

19 U.S.C. § 1035 provides in relevant part as follows:

> (a) All persons are prohibited from importing into the United States from any foreign country any book, pamphlet, paper, writing, advertisement, circular, print, picture, or drawing containing any matter advocating or urging treason or insurrection against the United States, or forcible resistance to any law of the United States, or containing any threat to take the life of or inflict bodily harm upon any person in the United States, or any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral, ... No such articles whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the collector that the obscene or other prohibited articles contained in the package were in-

closed therein without the knowledge or consent of the importer, owner, agent, or consignee, the entire contents of the package in which such articles are contained, shall be subject to seizure and forfeiture as hereinafter provided: . . . . *Provided further*, That the Secretary of the Treasury may, in his discretion, admit the so-called classics or books of recognized and established literary or scientific merit, but may, in his discretion, admit such classics or books only when imported for noncommercial purposes.

Upon the appearance of any such book or matter at any customs office, the same shall be seized and held by the collector to await the judgment of the district court as hereinafter provided; and no protest shall be taken to the United States Customs Court from the decision of the collector. Upon the seizure of such book or matter the collector shall transmit information thereof to the district attorney of the district in which is situated the office at which such seizure has taken place, who shall institute proceedings in the district court for the forfeiture, confiscation, and destruction of the book or matter seized. Upon the adjudication that such book or matter thus seized is not of the character the entry of which is by this section prohibited, it shall not be excluded from entry under the provisions of this section.

In any such proceeding any party in interest may upon demand have the facts at issue determined by a jury and any party may have an appeal or the right of review as in the case of ordinary actions or suits.

V

The said statute, 19 U.S.C. § 1305, on its face and as construed and applied herein, violates the rights guaranteed to the counter-claimant under the free speech and press, due process and equal protection provisions of the First and Fifth Amendments to the United States Constitution, in the following respects:

A. The statute is an impermissible prior restraint on freedom of expression in that it purports to exclude from the United States photographs to be used in a book limited to sale to adults and advertised in a tasteful fashion which will not invade the sensibilities or privacy of the general public. *Stanley* v. *Georgia*, 394 U.S. 557; *Stein* v. *Batchelor*, 300 F. Supp 602 (D.C. Texas

1969); *Luros* v. *Younger, et al.*, United States District Court for the Central District of California, No. 69–432–IH.

B. The statute violates the rule laid down by the United States Supreme Court in *Freedman* v. *Maryland*, 380 U.S. 51, and *Teitel Film Corp.* v. *Cusack*, 390 U.S. 139, which requires that any restraint prior to judicial determination can be imposed only briefly and must be specifically provided for by statute.

C. The statute violates the rule of *Quantity of Copies of Books* v. *Kansas*, 378 U.S. 205, in that it purports to authorize Customs to condemn a work as obscene without notice or adversary proceedings. *United States* v. *18 Packages of Magazines*, 238 F. Supp. 846; *Rizzi etc.* v. *Blount etc., et al.*, United States District Court for the Central District of California, No. 69–64–R.

D. The statute, purporting to authorize the seizure of a motion picture film upon mere probable cause, without evidence that the film is obscene and in the face of evidence that it is not obscene, violates the rule established in *United States & Postmaster General* v. *The Book Bin*, United States District Court for the Northern District of Georgia, Atlanta Division, Civil Action No. 12812, unreported.

E. The statute, by reason of the vagueness and ambiguity of its language, the lack of ascertainable standards, the omission of any requirement of scienter, the vesting of unfettered discretion in an administrative agency to suppress speech and press as allegedly obscene, abridges the exercise of freedoms of speech and press and deprives counter-claimant of liberty and property without due process of law.

VI

Counter-claimant has suffered great and irreparable damages as a result of the United States' wrongful conduct for which counter-claimant has no adequate remedy at law.

VII

There is a bona fide dispute between the parties consisting of the following:

A. The United States contends that the statute in question, 19 U.S.C. § 1305, is in all respects valid and constitutional, and specifically does not violate the constitutional guarantees as

set forth in Paragraph V, subparagraphs A, B, C, D and E hereof.

B. Counter-claimant contends that the statute in question, 19 U.S.C. § 1305, on its face and as construed and applied, violates constitutional guarantees as set forth in Paragraph V, subparagraphs A, B, C, D and E hereof.

WHEREFORE, defendants, claimant and counter-claimant pray:

1. That plaintiff's Complaint be dismissed.

2. That this Court issue a temporary injunction, preliminary injunction and final injunction, restraining and enjoining the United States, and its agents, servants, employees and attorneys and all persons in active concert or participating with it, from any proceedings, acts or other conduct enforcing the provisions of 19 U.S.C. § 1305 against counter-claimant in relation to the photographs named in the Complaint, and from withholding from counter-claimant the said photographs named in the Complaint; and directing the United States to forthwith deliver the said photographs to counter-claimant forthwith.

3. That counter-claimant have a judgment and decree of this Court declaring his rights and status, and more particularly adjudicating that:

A. 19 U.S.C. § 1305, on its face and as construed and applied herein, violates rights guaranteed to the counter-claimant under the free speech and press and due process provisions of the First and Fifth Amendments to the United States Constitution, in that it purports to exclude from the United States photographs to be used in a book limited to sale to adults and advertised in a tasteful fashion which will not invade the sensibilities or privacy of the general public.

B. 19 U.S.C. § 1305, on its face and as construed and applied herein, violates the rights guaranteed to the counter-claimant under the free speech and press and due process provisions of the First and Fifth Amendments to the United States Constitution, in that it fails to provide adequate procedural safeguards against undue suppression of protected expression by failing to provide for speedy judicial determination.

C. 19 U.S.C. § 1305, on its face and as construed and applied herein, violates the rights guaranteed to the counter-claimant under the free speech and press and due process provisions of the First and Fifth Amendments to the United States Constitution, in that it purports to authorize Customs to condemn a work obscene without notice or adversary proceedings.

D. 19 U.S.C. § 1305, on its face and as construed and applied herein, violates rights guaranteed to the counter-claimant under the free speech and press and due process provisions of the First and Fifth Amendments to the United States Constitution, in that it purports to authorize the seizure of photographs upon mere probable cause, without evidence that the photographs are obscene and in the face of evidence that they are not obscene.

E. 19 U.S.C. § 1305, on its face and as construed and applied herein, violates rights guaranteed to the counter-claimant under the free speech and press and due process provisions of the First and Fifth Amendments to the United States Constitution, in that it is void for vagueness.

F. The photographs named in the Complaint are entitled to protection from all governmental infringement by the provisions of the First Amendment to the United States Constitution.

4. To convene for the purpose of hearing and determining the application for a preliminary injunction of this cause, a statutory court of three judges, pursuant to the provisions of 28 U.S.C. § 2282, at least one of whom shall be a Circuit Judge, in accordance with the provisions of 28 U.S.C. § 2284.

5. The counter-claimant be given all such other, further and different relief as this Court may deem just.

STANLEY FLEISHMAN,
Attorney for Defendants,
Claimant and Counter-claimant.

United States District Court
Central District of California

Civil No. 69–2242–F

UNITED STATES OF AMERICA, PLAINTIFF

v.

THIRTY-SEVEN (37) PHOTOGRAPHS, DEFENDANTS
MILTON LUROS, CLAIMANT

NOTICE OF MOTION TO CONVENE A THREE-JUDGE COURT PURSUANT TO TITLE 18 U.S.C. SECTIONS 2282, 2284

409-568 O—70——2

TO: WM. MATTHEW BYRNE, JR., UNITED STATES ATTORNEY; FREDERICK M. BROSIO, JR., ASSISTANT UNITED STATES ATTORNEY; AND LARRY L. DIER, ASSISTANT UNITED STATES ATTORNEY:

PLEASE TAKE NOTICE that counter-claimant will move this Court in the Courtroom of the Honorable Warren J. Ferguson, United States Court House, 312 North Spring Street, Los Angeles, California on the 17th day of November, 1969, at 10:00 A.M., or as soon thereafter as counsel can be heard, for an order to convene a three-judge District Court pursuant to Title 18 U.S.C. §§ 2282, 2284, on the ground that the statute under which the Complaint was filed (Title 19 U.S.C. § 1305), on its face and as construed and applied, is unconstitutional, null and void.

The said motion will be based upon all the papers on file herein.

DATED: This 20th day of November, 1969.

STANLEY FLEISHMAN,
Attorney for Defendants and Counter-Claimant.

United States District Court
Central District of California

Civil No. 69–2242–F

UNITED STATES OF AMERICA, PLAINTIFF

v.

THIRTY-SEVEN (37) PHOTOGRAPHS, DEFENDANTS

MILTON LUROS, CLAIMANT

STIPULATION

IT IS HEREBY STIPULATED by and between the parties, through their respective counsel, that the Motion for the Convening of a Three-Judge Court may be heard on November 17, 1969 at 10:00 A.M.

IT IS FURTHER STIPULATED that the plaintiff waives time, and specifically consents to the hearing on the Motion on said date.

DATED: This 13th day of November, 1969.

STANLEY FLEISHMAN,
Attorney for Defendants and Claimant.

DATED: This —— day of November, 1969.

WM. MATTHEW BYRNE, Jr.,
United States Attorney.
FREDERICK M. BROSIO, Jr.,
Assistant U.S. Attorney,
Chief, Civil Division.
LARRY L. DIER,
Assistant U.S. Attorney.
By LARRY L. DIER,
Attorneys for Plaintiff.

IT IS SO ORDERED.
DATED: THIS 14 DAY OF NOVEMBER, 1969.

WARREN J. FERGUSON
United States District Judge.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 69-2262-F Date November 17, 1969

Title U.S.A. -v- Thirty-seven (37) photographs

DOCKET ENTRY

Ent proces, Upon Mot Ct's own Mot, Hrg on Claimant's mot to convene a 3 judge Ct ord cont'd to 11/18/69 at 9:30 A. M. (F)

PRESENT:

HON. WARREN J. FERGUSON, JUDGE

K. J. Murphy, Jr. (Deputy Clerk) None Present (Court Reporter)

ATTORNEYS PRESENT FOR PLAINTIFFS:

Larry L. Dier
Assistant U. S. Attorney

ATTORNEYS PRESENT FOR DEFENDANTS:

Stanley Fleishman
for Claimant

PROCEEDINGS: Claimant's motion to convene a three-judge Court.

IT IS ORDERED, on the Court's own motion, that the hearing on the claimant's motion is continued to November 18, 1969 at 9:30 A. M.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 69-2242-F Date November 18, 1969

Title U.S.A. -v- Thirty-Seven (37) photographs

DOCKET ENTRY

Ent proc, Ct ords Deft's Mot fax to convene 3 judge Ct Granted. Atty Deft prep ord on Mot. Atty Fld Deft's memo in suppt of Mot to convene 3 judge Ct. (F)

PRESENT:

HON. WARREN J. FERGUSON, JUDGE

E. J. Murphy, Jr. — Deputy Clerk

Barbara Davidow — Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

Larry L. Dier
Assistant U. S. Attorney

ATTORNEYS PRESENT FOR DEFENDANTS:

Stanley Fleishman

PROCEEDINGS: Claimant's motion to convene a three-judge Court.

The Court and counsel confer.
The Court makes a statement and orders the motion to convene a three-judge court granted.

Attorney for the defendant is to prepare the order by November 21, 1969

The Court and counsel confer.

Filed the defendant's memorandum in support of the motion to convene a three judge court.

United States District Court Central District of California

Civil No. 69-2242-F

UNITED STATES OF AMERICA, PLAINTIFF

v.

THIRTY-SEVEN (37) PHOTOGRAPHS, DEFENDANTS
MILTON LUROS, CLAIMANT

ORDER FOR CONVENING OF THREE-JUDGE COURT

On November 18, 1969,the motion to convene a three-judge court, pursuant to Title 18 U.S.C. §§ 2282, 2284, came before the Court, the plaintiff appearing by Larry L. Dier, Assistant

United States Attorney, and the defendants, claimant and counter-claimant appearing by Stanley Fleishman.

The Court, having examined the file herein and heard oral argument, and being of the opinion that there is a substantial question as to whether Title 19 U.S.C. § 1305, on its face and as construed and applied, is unconstitutional, null and void,

THE COURT NOW ORDERS the convening of a three-judge District Court, pursuant to Title 18 U.S.C. §§ 2282, 2284, to determine whether the plaintiff, the UNITED STATES OF AMERICA, should be enjoined from enforcing Title 19 U.S.C. § 1305.

DATED: This 20th day of Novmber, 1969.

WARREN J. FERGUSON,
United States District Judge.

APPROVED AS TO FORM:

STANLEY FLEISHMAN,
Attorney for Defendants,
Claimant and Counter-Claimant.
WM. MATTHEW BYRNE, JR.,
U.S. Attorney.
FREDERICK M. BROSIO, JR.,
Assistant U.S. Attorney,
Chief, Civil Division.
LARRY L. DIER,
Assistant U.S. Attorney.
By LARRY L. DIER,
Attorneys for Plaintiff.

United States District Court
Central District of California

Civil No. 69-2242-F

UNITED STATES OF AMERICA, PLAINTIFF

v.

THIRTY-SEVEN (37) PHOTOGRAPHS, DEFENDANTS
MILTON LUROS, CLAIMANT

STIPULATION

THE COURT, having ordered the convening of a three-judge District Court pursuant to 18 U.S.C. §§ 2282, 2284. and

this being a matter where a speedy determination is constitutionally required:

IT IS HEREBY STIPULATED by and between the parties, through their respective counsel, and subject to the Order of the Court, as follows:

1. Defendants, claimant and counter-claimant shall file an opening brief on or before December 2, 1969;

2. Plaintiff shall file its brief on or before December 9, 1969;

3. Defendants, claimant and counter-claimant shall file their reply brief on or before December 16, 1969.

DATED: This 18th day of November, 1969.

STANLEY FLEISHMAN,
Attorney for Defendants, Claimant and Counter-Claimant.

DATED: This 20th day of November, 1969.

WM. MATTHEW BYRNE, JR.,
U.S. Attorney.
FREDERICK M. BROSIO, JR.,
Assistant U.S. Attorney, Chief, Civil Division.
LARRY L. DIER,
Assistant U.S. Attorney.
By LARRY L. DIER,
Attorneys for Plaintiff.

IT IS SO ORDERED this 20th day of November, 1969.

WARREN J. FERGUSON,
United States District Judge.

In the United States District Court
Central District of California

Civil No. 69-2242-F

UNITED STATES OF AMERICA, PLAINTIFF

v.

THIRTY-SEVEN (37) PHOTOGRAPHS, DEFENDANTS

MILTON LUROS, CLAIMANT

ORDER SETTING DATE OF HEARING AND REGARDING STIPULATION OF FACTS

The parties are notified that the date for hearing oral argument before the three-judge district court on the issue framed

by the counterclaim is set for Friday, January 9, 1970, at 10:00 A.M. in Courtroom 15 of the United States Courthouse in Los Angeles.

It is suggested to the parties that a stipulation of facts be entered into and filed no later than December 19, 1969, to constitute the facts of the case in regard to the counterclaim.

In the event that the parties are unable to arrive at such a stipulation, they are ordered to contact the clerk of his court for a date for a pre-trial conference.

IT IS FURTHER ORDERED that the clerk serve copies of this order by United States mail upon counsel for the parties appearing in this action and provide a copy for Judges Barnes and Curtis.

NOVEMBER 26, 1969.

WARREN J. FERGUSON,
United States District Judge.

United States District Court Central District of California

Civil No. 69–2242–F

UNITED STATES OF AMERICA, PLAINTIFF

v.

THIRTY-SEVEN (37) PHOTOGRAPHS, DEFENDANTS

MILTON LUROS, CLAIMANT

STIPULATION OF FACTS IN REGARD TO THE COUNTER-CLAIM

PURSUANT TO ORDER of the Court dated November 26, 1969, the parties hereto, through their respective counsel, stipulate to the following facts of the case in regard to the Counter-Claim:

1. On or about October 24, 1969, the claimant, Milton Luros, a citizen of the United States, returned to this country, following a visit to Europe. He arrived at Los Angeles, California on TWA Flight No. 761.

2. On October 24, 1969, Customs agents in Los Angeles, California seized from Milton Luros the 37 photographs named herein, together with a book entitled *Forbidden Erotica* by

Rowlansan, a book album of the works of Peter Fende, and a "girlie" magazine. Attached hereto as APPENDIX A is Customs Receipt No. 586522.

3. On or about October 31, 1969, the District Director of the Bureau of Customs wrote claimant, advising him that the Bureau of Customs had referred the matter to the United States Attorney for the Central District of California for forfeiture action. A copy of the said letter is attached hereto as APPENDIX B.

4. On or about November 4, 1969, Stanley Fleishman, attorney for claimant, Milton Luros, wrote to the District Director of the Bureau of Customs requesting the forthwith delivery of the seized material. A copy of the said letter is attached hereto as APPENDIX C.

5. On or about November 5, 1969, Larry Dier, Assistant U.S. Attorney, released to Stanley Fleishman, attorney for claimant, Milton Luros, the following material, seized by Customs on October 24, 1969, as stated above: a book entitled *Forbidden Erotica* by Roylansan, a book album of the works of Peter Fende, and a "girlie" magazine. A copy of a Release is attached hereto as APPENDIX D.

6. On or about November 6, 1969, the plaintiff instituted the within action.

7. On or about November 14, 1969, defendants and claimant filed an Answer and Counter-Claim.

8. Some or all of the 37 photographs seized were intended to be incorporated in a hard cover edition of *The Kama Sutra of Vatsyayana*, which book describes candidly a large number of sexual positions. The book has been distributed widely throughout the Nation and has been acclaimed as a work of substantial value. At the time of the seizure of the 37 photographs, the claimant, Milton Luros, advised the Customs Inspector that at least some of the photographs were intended for inclusion in the book *The Kama Sutra*. Claimant Milton Luros showed the Customs inspector the title pages of *The Kama Sutra* which the photographs were to accompany, and requested the Customs inspector to keep the photographs and title pages together. This the Customs inspector declined to do. Attached to the original of this Stipulation are the cover pages of *The Kama Sutra* as

APPENDIX E. Attached to the copy of the Stipulation are Xerox copies thereof.

DATED: This 15th day of December, 1969.

STANLEY FLEISHMAN,
Attorney for Defendants and Claimant.

DATED: This 19th day of December, 1969.

WM. MATTHEW BYRNE, JR.,
United States Attorney.
FREDERICK M. BROSIO, JR.,
Assistant U.S. Attorney,
Chief, Civil Division.
LARRY L. DIER,
Assistant U.S. Attorney.

By LARRY L. DIER,
Attorney for Plaintiff.

TREASURY DEPARTMENT
BUREAU OF CUSTOMS

RECEIPT FOR MERCHANDISE OR BAGGAGE RETAINED IN CUSTOMS CUSTODY № 586522

INSTRUCTIONS—Prepare in TRIPLICATE. [illegible]

LA/LB

10/24/69 | TWA 761 | 10/24/69

MILTON LUROS - 17600 GLEDHILL ST. NORTHRIDGE CALIF

37 PHOTOGRAPHS | 1 MAGAZINE - [illegible]
1 BOOK - FORBIDDEN EROTICA | 1 BOOK ALBUM - PETER FLAME [illegible] T. ROMANCE — HELD UNDER SEC 305 TA
1 DIS. — [illegible] MATERIAL AS ABOVE

F. T. Price

CUSTOMS FORM 6051

TO THE PASSENGER: If someone other than yourself will take delivery of these goods, state on the reverse of this form the name and address of such person.

(APPENDIX A)

TREASURY DEPARTMENT
BUREAU OF CUSTOMS
LOS ANGELES, CALIF.

October 31, 1969

REFER TO

2720-10655, 10/24/69 WRK/JJH/pd

Mr. Milton Luros
17600 Gledhill Street
Northridge, California

Dear Mr. Luros:

This is to inform you that thirty-seven (37) photographs, one (1) book, one (1) magazine and one (1) book album seized from you upon your arrival at Los Angeles International Airport on October 24, 1969 have been referred to the United States Attorney for the Central District of California for forfeiture action.

Sincerely yours,

WILLIAM R. KNOKE
District Director

(APPENDIX B)

November 4, 1969

William R. Knoke, Disdrict Director
Bureau of Customs
Port of Los Angeles - Long Beach
300 South Ferry Street
Terminal Island, California 90731

Re: Your 2720-10655, 10/24/69 - Mr. Milton Luros

Dear Mr. Knoke:

Your letter of October 31, 1969 addressed to my client, Milton Luros, has been turned over to me for reply.

I am more than a little surprised at the seizure in this matter since it plainly involves works of art by artists of renown. As you are undoubtedly aware, United States Customs has in the past permitted the importation of erotic art of a wide variety, including Japanese, Indian, Roman and Greek works. Grove Press recently published a book of erotic art by the Kronhausen's and more recently published the erotic art of Rowlandsan. The Rowlandsan pictures held by Customs are identical to those appearing in the Grove Press book.

On behalf of my client, I respectfully request the forthwith delivery of the seized material, on the grounds that: (1) the material is protected by the First Amendment; (2) the material is not being imported for distribution to minors, nor to be thrust upon unwilling viewers; and (3) the statute under which the seizure was made and pursuant to which the material is held is unconstitutional on its face and as construed and applied.

Very truly yours,

STANLEY FLEISHMAN

SF:eas

cc: Larry Dier, Assistant United States Attorney
Federal Building, Los Angeles

(APPENDIX C)

November 5, 1969

RELEASE OF MATERIAL SEIZED BY CUSTOMS

STANLEY FLEISHMAN, attorney for MILTON LUROS, hereby acknowledges receipt of the following material retained by Customs on October 24, 1969, and receipted for in No. 586522 by the Customs Bureau:

1. One book album by Peter Fendi;
2. One book of Forbidden Erotica by Rowlansan;
3. One magazine - "Girdle Girl".

It is understood that 37 photographs are being held by Customs for further consideration by Customs.

/STANLEY FLEISHMAN

THE ABOVE IS ACCURATE.

LARRY DIER
Assistant U. S. Attorney

(APPENDIX D)

21

THE

KAMA SUTRA

OF

VATSYAYANA.

TRANSLATED FROM THE SANSCRIT.

IN SEVEN PARTS,

WITH

PREFACE, INTRODUCTION,

AND

CONCLUDING REMARKS.

BENARES:
PRINTED FOR THE HINDOO KAMA SHASTRA SOCIETY

1883.
FOR PRIVATE CIRCULATION ONLY.

(APPENDIX E)

(APPENDIX E)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 69-2262-F Date January 9, 1970

Title U.S.A. -v- 37 Photographs

DOCKET ENTRY

Ent proc, the matter is argued before the 3 judge Court and the Court orders the matter submitted. (Barnes, Curtis & Ferguson)

PRESENT: STANLEY N. BARNES, U. S. Circuit Judge
JESSE W. CURTIS, U. S. District Judge
HON. WARREN J. FERGUSON, JUDGE

K. J. Murphy, Jr. Deputy Clerk — Barbara Davidow Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

Larry L. Dier
Assistant U. S. Attorney

ATTORNEYS PRESENT FOR DEFENDANTS:

Stanley Fleishman
for Claimant.

T
PROCEEDINGS: ORAL ARGUMENT:

The Court convenes at 10:17 A. M.

Attorney Fleishman makes astatement in support of the claimant.

The Attorney for the Plaintiff makes a statement in support of the Plaintiff.
Attorney Fleishman replies.
The Court orders the matter submitted.

The Court recesses at 11:55 A. M.

In the United States District Court
Central District of California

Civil No. 69–2242–F

UNITED STATES OF AMERICA, PLAINTIFF
v.
THIRTY-SEVEN (37) PHOTOGRAPHS, DEFENDANTS

MILTON LUROS, CLAIMANT

MEMORANDUM OPINION

Before: BARNES, *Circuit Judge*, and CURTIS and FERGUSON, *District Judges.*

FERGUSON, *District Judge:*

This is an action before a three-judge district court, convened pursuant to 28 U.S.C. §§ 2282 and 2284, to determine whether the government should be enjoined from enforcing 19 U.S.C. § 1305. That statute prohibits all persons from importing into the United States any obscene picture or book. It provides that when such an item appears at a customs office it shall be seized and held to await the judgment of a district court.

On October 24, 1969, Milton Luros returned to Los Angeles from a visit to Europe, arriving by plane. In his personal luggage he carried 37 photographs. In the course of an inspection, customs agents acting under authority of § 1305 seized the photographs as obscene. The agents referred the seizure to the United States Attorney, and on November 6, 1969, the government filed its complaint seeking judicial authority to enforce the forfeiture of the photographs.

On November 14, 1969, the claimant filed an answer contending the photographs were not obscene. His counterclaim contends that § 1305 violates the First and Fifth Amendments, and seeks an injunction to restrain the government from enforcing the statute in relation to the 37 photographs.

The case presents a five-fold constitutional attack on § 1305, claiming that:

(1) It excludes from the United States photographs imported for use by adults in the privacy of their home.

(2) It excludes photographs which are to be distributed to adults only and in a manner which will not invade the sensitivities or privacy of anyone.

(3) It permits customs agents to seize and hold pictures without a time restraint.

(4) It permits a seizure prior to an adversary hearing.

(5) It is unconstitutionally vague.

The cornerstone of the attack, of course, is *Stanley* v. *Georgia*, 394 U.S. 557 (1969). There the Supreme Court minimally held that the First Amendment prohibits the making of mere private possession of obscene material a crime. The lower courts now are faced with whether *Stanley* means more than that. See *Karalexis* v. *Byrne*, Civil No. 69–665–J (D. Mass., Nov. 28, 1969); *Stein* v. *Batchelor*, 300 F. Supp. 602 (N.D. Texas 1969).

The claimant requests this court to hold that *Stanley* means that the First Amendment forbids any restraint of obscenity unless (1) it falls in the hands of children, or (2) it intrudes upon the sensitivities or privacy of the general public. Without rejecting this argument, we decide the case based upon the narrowest construction of *Stanley*.

19 U.S.C. § 1305 reaches all obscene works. It prohibits an adult from importing an obscene book or picture for private reading or viewing, an activity which is constitutionally protected. As stated in *Stanley*, the right to read necessarily protects the right to receive. The claimant does not contend, however, that he was merely going to bring the pictures into his own home. He admits that it is his intention to incorporate the pictures in a book for distribution.

The admission of claimant, that is, to distribute and not to view privately, does not prohibit his attack on invalidity of the statute. *Freedman* v. *Maryland*, 380 U.S. 51 (1965), grants the claimant standing for it holds that in determining the validity of a statute in relation to the First Amendment, a court must determine what the statute can do. If the statute can violate the freedom of speech and press, then it is invalid. This it clearly does. It prohibits a person who may constitutionally view pictures of the right to receive them. To quote from Justice Brennan's concurring opinion in *Lamont* v. *Postmaster General*, 381 U.S. 301, 308 (1965), "[T]he right to receive publications is . . . a fundamental right. The dissemination of

ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers."

The First Amendment cannot be construed to permit those who have funds for foreign travel to bring back constitutionally protected literature while prohibiting its access by the less affluent.

A second attack on the statute further involves *Freedman* v. *Maryland, supra.* Any system of censorship must contain, at the minimum, the following procedural safeguards if it is not to contravene the First and Fifth Amendments, (1) any restraint prior to judicial determination can be imposed only briefly, and (2) the censor in a specified brief period will go to court. The safeguards must be contained in the statute or by judicial rule. Section 1305 is a system of censorship by customs agents and is barren of safeguards.

In the context of this case, the claimant concedes that the government has moved rapidly for a judicial determination of the forfeiture. Yet from the date of the seizure to January 9, 1970, the date of the court hearing, 76 days had passed. All concede that under present statutory procedures it could not have been accomplished any sooner. Section 1305 does not prohibit customs agents from long delaying judicial determination. The First Amendment does not permit such discretion.

We are aware of *United States* v. *One Carton Positive Motion Picture Film,* 367 F. 2d 889, 899 (2d Cir. 1966), which stated, "[S]pecific time limitations on administrative action are unnecessary and would serve only to inject inflexibility into the regulatory scheme . . ." That may or may not be true. We only note that such is contrary to the explicit holding in *Freedman, supra* at 58–59, "[T]he exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period . . . go to court . . . ." We must follow *Freedman.*

We decline to consider as unnecessary the remaining attacks on the constitutionality of § 1305, *i.e.,* (1) vagueness and (2) the law set forth in *Marcus* v. *Search Warrant,* 367 U.S. 717 (1961), and *A Quantity of Copies of Books* v. *Kansas,* 378 U.S. 205 (1964).

Pursuant to the provisions of Rule 52 of the Federal Rules of Civil Procedure, this memorandum opinion shall constitute the

court's findings of fact and conclusions of law.

In accordance with the provisions of Rule 58, a judgment shall be separately prepared and entered as follows:

1. Pursuant to 28 U.S.C. § 1253, this is an order in a civil action heard and determined by a district court of three judges granting a permanent injunction after notice and hearing.

2. The United States and its agents are restrained and enjoined from enforcing the provisions of 19 U.S.C. § 1305 against the claimant Milton Luros, in relation to the 37 photographs seized by customs agents in Los Angeles, California, on October 24, 1969.

3. The United States shall deliver said photographs to the claimant.

4. 19 U.S.C. § 1305, on its face and as construed and applied, violates the rights guaranteed to the claimant under the free speech and press and due process provisions of the First and Fifth Amendments to the United States Constitution.

5. The enforcement of this judgment shall be stayed for a period of 30 days, in order to preserve to the government its right of appeal.

Dated this 27th day of January, 1970.

WARREN J. FERGUSON,
United States District Judge.

We Concur:

STANLEY N. BARNES,
United States Circuit Judge.
JESSE W. CURTIS,
United States District Judge.

In the United States District Court
Central District of California

Civil No. 69-2242-F

UNITED STATES OF AMERICA, PLAINTIFF

v.

THIRTY-SEVEN (37) PHOTOGRAPHS, DEFENDANTS

MILTON LUROS, CLAIMANT

JUDGEMENT ON COUNTERCLAIM

The court having filed its memorandum opinion which constitutes its findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure, and in accordance therewith, judgment is decreed in favor of the claimant, Milton Luros, on his counterclaim filed November 14, 1969, and against the United States of America, as follows:

1. Pursuant to 28 U.S.C. § 1253, this is an order in a civil action heard and determined by a district court of three judges granting a permanent injunction after notice and hearing.

2. The United States and its agents are restrained and enjoined from enforcing the provisions of 19 U.S.C. § 1305 against the claimant Milton Luros, in relation to the 37 photographs seized by customs agents in Los Angeles, California, on October 24, 1969.

3. The United States shall deliver said photographs to the claimant.

4. 19 U.S.C. § 1305, on its face and as construed and applied, violates the rights guaranteed to the claimant under the free speech and press and due process provisions of the First and Fifth Amendments to the United States Constitution.

5. The enforcement of this judgment shall be stayed for a period of 30 days, in order to preserve to the government its right of appeal.

Dated this 27th day of January, 1970.

STANLEY N. BARNES,
United States Circuit Judge.
JESSE W. CURTIS,
United States District Judge.
WARREN J. FERGUSON,
United States District Judge.

United States District Court
Central District of California

Civil No. 69–2242–F

UNITED STATES OF AMERICA, PLAINTIFF

v.

THIRTY-SEVEN (37) PHOTOGRAPHS, DEFENDANT

MILTON LUROS, CLAIMANT

NOTICE OF APPEAL

Plaintiff, United States of America, hereby appeals to the United States Supreme Court under the provisions of 28 U.S.C. §§ 2101 and 2282 from the Judgment on Counterclaim entered January 27, 1970, in this case.

The attorneys for the parties and their addresses are: For the plaintiff, United States of America, W. Matthew Byrne, Jr., United States Attorney, Frederick M. Brosio, Jr., Assistant U.S. Attorney, Chief, Civil Division, and Larry L. Dier, Assistant U.S. Attorney, United States Court House, 312 North Spring Street, Los Angeles, California 90012; for the claimant, Milton Luros, Stanley Fleishman, Suite 700, Taft Building, 1680 Vine Street, Hollywood, California 90028.

DATED: February 26, 1970.

WM. MATTHEW BYRNE, JR.,
United States Attorney.

LARRY L. DIER,
Assistant U.S. Attorney,
Attorneys for Plaintiff.

In the Supreme Court of the United States

No. 133 —, October Term, 1970

UNITED STATES, APPELLANT

v.

THIRTY-SEVEN (37) PHOTOGRAPHS, MILTON LUROS, CLAIMANT

APPEAL from the United States District Court for the Central District of California.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

OCTOBER 12, 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970—O—409-568

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. ———

UNITED STATES OF AMERICA, APPELLANT

v.

THIRTY-SEVEN (37) PHOTOGRAPHS, MILTON LUROS, CLAIMANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The memorandum opinion of the three-judge District Court for the Central District of California (Appendix A, *infra*, pp. 15-19) is not yet reported.

JURISDICTION

On January 27, 1970, the three-judge United States District Court for the Central District of California, convened pursuant to 28 U.S.C. 2282, en-

tered an order permanently restraining the appellant and its agents from enforcing the provisions of 19 U.S.C. 1305(a) (the customs obscenity statute) on the ground that the statute on its face and as applied in this case violated the claimant's rights under the First and Fifth Amendments to the Constitution (see Appendix B, *infra*, pp. 20-21). A notice of appeal was filed in the district court on February 26, 1970. The jurisdiction of this Court rests on 28 U.S.C. 1253, which allows a direct appeal to this Court from an order of a three-judge court properly convened under 28 U.S.C. 2282, granting a permanent injunction. See *e.g.*, *Zemel* v. *Rusk*, 381 U.S. 1, 5-7; *Flast* v. *Cohen*, 392 U.S. 83, 90-91.

QUESTIONS PRESENTED

1. Whether the United States may validly prohibit the importation of obscene matter for subsequent commercial distribution.

2. Whether a person importing obscene matter for commercial distribution has standing to challenge a statute also prohibiting the importation of such matter for private use and, if so, whether the statute is valid.

3. Whether the statute prohibiting the importation of obscene matter into the United States, 19 U.S.C. 1305(a), provides adequate administrative and judicial safeguards.

STATUTE INVOLVED

19 U.S.C. 1305(a) provides in pertinent part:

> All persons are prohibited from importing into the United States from any foreign country * * * any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral * * *. No such articles whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the collector that the obscene or other prohibited articles contained in the package were inclosed therein without the knowledge or consent of the importer, owner, agent, or consignee, the entire contents of the package in which such articles are contained, shall be subject to seizure and forfeiture as hereinafter provided: * * * *Provided, further*, That the Secretary of the Treasury may, in his discretion, admit the so-called classics or books of recognized and established literary or scientific merit, but may, in his discretion, admit such classics or books only when imported for noncommercial purposes.
>
> Upon the appearance of any such book or matter at any customs office, the same shall be seized and held by the collector to await the judgment of the district court as hereinafter provided; and no protest shall be taken to the United States Customs Court from the decision of the collector. Upon the seizure of such book or matter the collector shall transmit informa-

tion thereof to the district attorney of the district in which is situated the office at which such seizure has taken place, who shall institute proceedings in the district court for the forfeiture, confiscation, and destruction of the book or matter seized. Upon the adjudication that such book or matter thus seized is of the character the entry of which is by this section prohibited, it shall be ordered destroyed and shall be destroyed. Upon adjudication that such book or matter thus seized is not of the character the entry of which is by this section prohibited, it shall not be excluded from entry under the provisions of this section.

In any such proceeding any party in interest may upon demand have the facts at issue determined by a jury and any party may have an appeal or the right of review as in the case of ordinary actions or suits.

STATEMENT

The pertinent facts were stipulated in the district court (Appendix C, *infra*, pp. 22-24). On October 24, 1969, claimant Luros returned to this country by airplane from Europe, arriving at Los Angeles. During the customs inspection, customs agents seized from his luggage the thirty-seven photographs involved herein,[1] a book entitled *Forbidden Erotica*, a book album of the works of one Peter Fende, and a "girlie" magazine. It was further stipulated that (Appendix C, *infra*, pp. 23-24):

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[1] We are lodging these photographs with the Clerk of this Court.

> Some or all of the 37 photographs seized were intended to be incorporated in a hard cover edition of *The Kama Sutra of Vatsyayana*, which book describes candidly a large number of sexual positions. The book has been distributed widely throughout the Nation and has been acclaimed as a work of substantial value. At the time of the seizure of the 37 photographs, the claimant, Milton Luros, advised the Customs Inspector that at least some of the photographs were intended for inclusion in the book *The Kama Sutra*. * * *

On October 31, 1969, the District Director of the Bureau of Customs wrote Luros, advising him that the matter had been referred to the United States Attorney for forfeiture action. On November 4, 1969, Luros' attorney wrote the District Director demanding the return of the seized material. On the following day, the United States Attorney's Office returned all the material seized except for the thirty-seven photographs. On November 6, 1969, the United States commenced the present action under 19 U.S.C. 1305(a) for forfeiture of the photographs as obscene. On November 14, 1969, Luros filed an answer and counterclaim contending that the photographs were not obscene and that 19 U.S.C. 1305(a) was unconstitutional. He moved to convene a three-judge district court under 28 U.S.C. 2282 to resolve these issues. After a hearing, that motion was granted; the three-judge court heard the case on January 9, 1970.

On January 27, 1970, the court concluded that the statute was invalid on its face, and entered a perma-

nent restraining order. It reasoned that since the legislation reaches "all obscene works" and "prohibits an adult from importing an obscene book or picture for private reading or viewing," it unconstitutionally infringed upon protected First Amendment activity under this Court's decision in *Stanley* v. *Georgia*, 394 U.S. 557, by depriving "a person who may constitutionally view pictures of the right to receive them." The court made this finding despite its recognition that claimant had not imported the pictures for his own personal or private use, but rather for inclusion in a book for commercial distribution; it concluded that *Freedman* v. *Maryland*, 380 U.S. 51, authorized this attack on the statute (see App. A, *infra*, pp. 16-17).

The court also ruled that the statute, both on its face and as applied in this case, granted excessive administrative discretion, *Freedman* v. *Maryland*, *supra*, in that it failed to provide a "specified brief period" within which the issue of obscenity had to be litigated in a judicial adversary proceeding (see App. A, *infra*, pp. 17-18).

THE QUESTIONS ARE SUBSTANTIAL

The holding below that 19 U.S.C. 1305(a) is unconstitutional on its face deprives the United States of authority to prevent the importation of obscene material into the Central District of California and, if affirmed, would deprive it of that authority throughout the nation. The holding casts doubt, as well, on the many statutes by which the federal and state governments proscribe the commercial dis-

tribution of obscene matter. In our view, this holding finds no justification in the Constitution and this Court's precedents, including its recent decision in *Stanley* v. *Georgia*, 394 U.S. 557.[2]

1. We deem it indisputable that the federal government has authority to prohibit the importation of obscene materials into this country for commercial distribution. Article I, Section 8, of the Constitution specifically grants Congress the power "To regulate commerce with foreign nations," and that power includes the power to "exclude merchandise at [its] discretion." *Brolan* v. *United States*, 236 U.S. 216, 219; *Weber* v. *Freed*, 239 U.S. 325, 329. *Roth* v. *United States*, 354 U.S. 476, makes plain that this power extends to materials which are "obscene"; that holding and subsequent cases following it "are not impaired" by this Court's holding in *Stanley* v. *Georgia*, 394 U.S. 557, 568, that "the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime." Our views on the meaning of *Stanley* are set out at some length in the government's Brief as *Amicus Curiae* in *Byrne* v. *Karalexis*, No. 1149, this Term; we need not repeat that analysis here. It suffices to note that, on the stipulated facts, this is a purely commercial case—without even the patina of restrictions on access to the materials which appellees in *Byrne* claim protects them from state regulation.

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[2] The validity of the customs statute under *Stanley* is also pending before a three-judge court in the Southern District of New York. *United States* v. *Various Articles of Obscene Merchandise*, 68 Civ. 2972.

2. The district court's conclusion that the importation statute is impermissibly broad is incorrect, and in any event decides a question which ought not to have been reached in this case, since the commercial conduct here is the sort of conduct that would obviously be prohibited under any construction of the statute.

a. The district court apparently believed that the statute was overbroad because it prohibited even the importation of a single copy of an obscene item for private, non-commercial use by the importer himself.[3] As in *Byrne, supra*, the court relied for its interpretation of *Stanley* on this Court's statement in that case that "the Constitution protects the right to receive information and ideas," 394 U.S. at 564, as indicating that private individuals have a "right to receive" even matter which is "obscene."

But again, as we show in our *Byrne* brief, there is no right to receive obscene matter, as such. *Stanley* held only that the government lacks power to punish or bar the possession of obscene material "in the privacy of a person's own home," 394 U.S. at 564, where the interests protected by the First and Fourth Amendments tend to merge. It repeatedly affirmed the continuing vitality of "*Roth* and the cases fol-

[3] The court appears also to have reasoned that because rich persons could travel abroad, purchase obscene works, and bring them back to this country, the less affluent must be able to have access to such works through distributors who purchase and import the works for them. As the text shows the premise of this argument is incorrect. But even if the rich have such a right, it is difficult to take seriously the equal protection notion thus advanced. See the Government's brief in *Byrne, supra*, at p. 16 n. 12.

lowing that decision," 394 U.S. at 568. It is one thing to say that sexual conduct in the privacy of the home is of no legitimate concern to the state absent injury and complaint. Cf. *Griswold* v. *Connecticut*, 381 U.S. 479. It does not follow, however, that the state lacks power to bar prostitution or its procurement or—of particular significance here—the transportation of women in interstate or foreign commerce for immoral purposes.

A customs inspection at the borders of the country is a very different matter from a police search through a private library or office. There is no right of privacy regarding the contents of one's trunks at the borders; books and papers may be examined without probable cause, if for nothing else than to see what may be concealed between their leaves. *Carroll* v. *United States*, 267 U.S. 132, 150-154. And if the state has the power to exclude from importation those matters which are "obscene," that power extends to single copies imported for what are said to be private purposes as well as avowedly commercial enterprises. Books in a private home or office may fairly be presumed to have come to rest; obscene matter in transit through the ports cannot be so regarded. If the material may be excluded without offense to the First Amendment, there is no right of privacy to require that, in assertedly private hands, it must nonetheless be free from inspection. Even as to private, noncommercial importations, then, *Stanley* does not control.

b. In any event, since appellee admitted that he was importing the pictures in question for commer-

cial purposes, he cannot be permitted to rely on the possible overbreadth of the statute as applied to others as a basis for freeing himself of its commands. It is clear that the statute is not unconstitutionally vague in its designation of what materials may not be imported. That issue was settled by *Roth*. This Court then adopted, and since has consistently applied, an approach to the obscenity question in which the issue is not the invalidity of statutory provisions on their face, but whether the provisions are invalid as applied. *E.g.*, *Ginzburg* v. *United States*, 383 U.S. 463; *Memoirs* v. *Massachusetts*, 383 U.S. 413; *Redrup* v. *New York*, 386 U.S. 767; Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 884-887, 921-922 (1970). Previous First Amendment cases permitting persons not directly affected by an alleged defect to raise a claim that a statutory scheme was invalid on its face, on the other hand, generally have involved issues of "vagueness" as well as "overbreadth." *E.g.*, *Thornhill* v. *Alabama*, 310 U.S. 88, 96-98; *Dombrowski* v. *Pfister*, 380 U.S. 479, 490-492; see *Freedman* v. *Maryland*, 380 U.S. 51, 57. Where vagueness is absent, there is no spectre of a possible "chilling effect" through uncertainty to justify an expansive attitude toward standing to raise the constitutional claims of others. Restrictive construction can be relied upon to eliminate any unconstitutional overbreadth. See Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 Yale L.J. 599 (1962); Note, *supra*, 83 Harv. L. Rev. at 907-910.

Thus, even if the importation of obscene material for personal use could not be prohibited, there is no

occasion to permit commercial importers to assert those rights in defense of their own, quite different activities. Those commercial activities are "the sort of 'hard-core' conduct that would obviously be prohibited under any construction" of the statute, *Dombrowski* v. *Pfister*, *supra*, 380 U.S. at 491-492.[4] Whatever the impact of *Stanley* on the customs treatment of the person who imports obscene articles for his own private use, the court below departed from the settled approach of *Roth* by striking down the entire statute at the behest of a commercial importer of obscene material.[5]

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[4] An analogy can be drawn to the commercial solicitation cases. It is thus "not open to the solicitors for gadgets or brushes" to assert the First Amendment claims of noncommercial distributors of pamphlets or magazines. Compare *Breard* v. *Alexandria*, 341 U.S. 622, 641; *Valentine* v. *Chrestensen*, 316 U.S. 52, and *Ginzburg* v. *United States*, 383 U.S. 463, 475, with *Martin* v. *Struthers*, 319 U.S. 141. See Note, *supra*, 83 Harv. L. Rev. at 908-910.

[5] The court below found standing under *Freedman* v. *Maryland*, 380 U.S. 51 (see App. A *infra*, p. 17). That case held only, however, that any claimant may challenge the *procedures* of a licensing statute granting broad seizure power over alleged obscene material, where the sweeping nature of those procedures, on their face, substantially inhibits the exercise of rights of those who may be entitled to First Amendment protection. See 380 U.S. at 56-57; cf. *Interstate Circuit* v. *Dallas*, 390 U.S. 676, 683-684. *Freedman* did not deal with the question of a challenge raising the sufficiency of the "obscenity" standard itself. Moreover, as we show, *infra*, pp. 12-14, there is no warrant in this case for holding that the administrative procedures of 19 U.S.C. 1305(a) are invalid on their face (or invalid as applied in this case) under the rationale of *Freedman*.

2. The court below also erred, in our view, in holding that the procedures set out in Section 1305 (a) for resolution of the obscenity issue regarding imported materials are unconstitutional under *Freedman* v. *Maryland*, 380 U.S. 51, because they fail to provide a "specified brief period" within which the issue must be taken to court, and in holding that the procedures utilized in this case were deficient.

The validity of initial detention of questionable material by customs authorities is hardly open to challenge in light of the broad congressional power to regulate the importation of material and goods from foreign sources and the numerous regulatory purposes that detention serves. *E.g.*, *United States* v. *One Carton Positive Motion Picture Film Entitled "491"*, 367 F. 2d 889, 898 (C.A. 2); *United States* v. *392 Copies of a Magazine Entitled "Exclusive"*, 253 F. Supp. 485, 490-491 (D. Md.), affirmed, 373 F. 2d 633 (C.A. 4), reversed on other grounds *sub nom. Central Magazine Sales, Ltd.* v. *United States*, 389 U.S. 50. Section 1305(a) authorizes administrative detention for only a short time, preliminary to a prompt judicial determination of the question whether the seized material is obscene. The seizure and forefeiture provisions of the statute are not rendered invalid because Congress did not fix exact time limits.

The statute provides that "[u]pon the seizure" of an article thought to be obscene, "the collector shall transmit information thereof to the district attorney of the district * * * who shall institute" forfeiture proceedings in the district court. Under a companion

enactment, 19 U.S.C. 1604, the United States Attorney is required to commence such forfeiture proceedings "without delay" if he believes the material to be obscene. The statute thus contemplates swift administrative action (see *United States* v. *One Book Entitled "The Adventures of Father Silas"*, 249 F. Supp. 911, 918 (S.D.N.Y.); the *"Exclusive"* case, *supra*, 253 F. Supp. at 490-491) and consequent judicial dispatch consonant with a sound resolution of the question of obscenity (see *United States* v. *One Carton Positive Motion Picture Film Entitled "491"*, *supra*, 367 F. 2d at 898-900; *United States* v. *56 Cartons Containing 19,500 Copies of a Magazine Entitled "Hellenic Sun"*, 373 F. 2d 635, 637 (C.A. 4), reversed on other grounds *sub nom. Potomac News Co.* v. *United States*, 389 U.S. 47; *United States* v. *77 Cartons of Magazines*, 300 F. Supp. 851, 853 (N.D. Cal.).

As pointed out by the Second Circuit in the *"491"* case (*id.* at 899), the legislative history of the statute, as well as its language, indicates that Congress intended that the issue of obscenity " 'be quickly submitted to the district attorney and to the court for determination.' 72 Cong. Rec. 5422 (1930)." And see *"Father Silas"*, *supra*, 249 F. Supp. at 916-918. In short, this customs statute meets the requirement announced by this Court in *Freedman* v. *Maryland*, 380 U.S. 51, 59, that "[a]ny restraint imposed in advance of a final judicial determination on the merits must * * * be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution"; see also *Manual En-*

terprises v. *Day*, 370 U.S. 478, 514-515 (Brennan, J. concurring).

There was no unreasonable delay in implementing the statutory scheme in this case, and appellee conceded below (Appendix A, *infra*, p. 18) that the government moved rapidly. It took less than two weeks to complete the administrative process from the time of the seizure to the filing of the forfeiture action. The fact that another two months elapsed before the court hearing was not due to the actions of the government, but to appellee's invocation of the three-judge court machinery to determine his contention that the customs statute in its entirety was unconstitutional. That delay thus did not arise from any defect in 19 U.S.C. 1305(a) regarding the procedures to be followed in adjudicating the issue of obscenity of the particular materials. Contrast *Teitel Film Corp.* v. *Cusack*, 390 U.S. 139.

CONCLUSION

For the reasons stated, it is respectfully submitted that probable jurisdiction should be noted.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

JEROME M. FEIT,
ROGER A. PAULEY,
Attorneys.

APRIL 1970.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

Civil No. 69-2242-F

UNITED STATES OF AMERICA, PLAINTIFF

v.

THIRTY-SEVEN (37) PHOTOGRAPHS, DEFENDANTS, MILTON LUROS, CLAIMANT

MEMORANDUM OPINION

Before: Barnes, Circuit Judge, and Curtis and Ferguson, District Judges.

Ferguson, District Judge:

This is an action before a three-judge district court, convened pursuant to 28 U.S.C. §§ 2282 and 2284, to determine whether the government should be enjoined from enforcing 19 U.S.C. § 1305. That statute prohibits all persons from importing into the United States any obscene picture or book. It provides that when such an item appears at a customs office it shall be seized and held to await the judgment of a district court.

On October 24, 1969, Milton Luros returned to Los Angeles from a visit to Europe, arriving by plane. In his personal luggage he carried 37 photographs. In the course of an inspection, customs agents acting under authority of § 1305 seized the photographs as obscene. The agents referred the seizure to the United States Attorney, and on November 6, 1969, the government filed its complaint seeking judicial authority to enforce the forfeiture of the photographs.

On November 14, 1969, the claimant filed an answer contending the photographs were not obscene. His counterclaim contends that § 1305 violates the First and Fifth Amendments, and seeks an injunction to restrain the government from enforcing the statute in relation to the 37 photographs.

The case presents a five-fold constitutional attack on § 1305, claiming that:

> (1) It excludes from the United States photographs imported for use by adults in the privacy of their home.
>
> (2) It excludes photographs which are to be distributed to adults only and in a manner which will not invade the sensitivities or privacy of anyone.
>
> (3) It permits customs agents to seize and hold pictures without a time restraint.
>
> (4) It permits a seizure prior to an adversary hearing.
>
> (5) It is unconstitutionally vague.

The cornerstone of the attack, of course, is *Stanley* v. *Georgia*, 394 U.S. 557 (1969). There the Supreme Court minimally held that the First Amendment prohibits the making of mere private possession of obscene material a crime. The lower courts now are faced with whether *Stanley* means more than that. See *Karalexis* v. *Byrne*, Civil No. 69-665-J (D. Mass., Nov. 28, 1969); *Stein* v. *Batchelor*, 300 F. Supp. 602 (N.D. Texas 1969).

The claimant requests this court to hold that *Stanley* means that the First Amendment forbids any restraint of obscenity unless (1) it falls in the hands of children, or (2) it intrudes upon the sensitivities or privacy of the general public. Without rejecting this argument, we decide the case based upon the narrowest construction of *Stanley*.

19 U.S.C. § 1305 reaches all obscene works. It prohibits an adult from importing an obscene book or picture for private reading or viewing, an activity which is constitutionally protected. As stated in *Stanley*, the right to read necessarily protects the right to receive. The claimant does not contend, however, that he was merely going to bring the pictures into his own home. He admits that it is his intention to incorporate the pictures in a book for distribution.

The admission of claimant, that is, to distribute and not to view privately, does not prohibit his attack on invalidity of the statute. *Freedman* v. *Maryland*, 380 U.S. 51 (1965), grants the claimant standing for it holds that in determining the validity of a statute in relation to the First Amendment, a court must determine what the statute can do. If the statute can violate the freedom of speech and press, then it is invalid. This it clearly does. It prohibits a person who may constitutionally view pictures of the right to receive them. To quote from Justice Brennan's concurring opinion in *Lamont* v. *Postmaster General*, 381 U.S. 301, 308 (1965), "[T]he right to receive publications is . . . a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers."

The First Amendment cannot be construed to permit those who have funds for foreign travel to bring back constitutionally protected literature while prohibiting its access by the less affluent.

A second attack on the statute further involves *Freedman* v. *Maryland*, *supra*. Any system of censorship must contain, at the minimum, the following procedural safeguards if it is not to contravene the Fifth Amendments, (1) any restraint prior to judicial determination can be imposed only briefly, and

(2) the censor in a specified brief period will go to court. The safeguards must be contained in the statute or by judicial rule. Section 1305 is a system of censorship by customs agents and is barren of safeguards.

In the context of this case, the claimant concedes that the government has moved rapidly for a judicial determination of the forfeiture. Yet from the date of the seizure to January 9, 1970, the date of the court hearing, 76 days had passed. All concede that under present statutory procedures it could not have been accomplished any sooner. Section 1305 does not prohibit customs agents from long delaying judicial determination. The First Amendment does not permit such discretion.

We are aware of *United States* v. *One Carton Positive Motion Picture Film*, 367 F.2d 889, 899 (2d Cir. 1966), which stated, "[S]pecific time limitations on administrative action are unnecessary and would serve only to inject inflexibility into the regulatory scheme . . . ." That may or may not be true. We only note that such is contrary to the explicit holding in *Freedman*, *supra* at 58-59, "[T]he exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period . . . go to court . . . ." We must follow *Freedman*.

We decline to consider as unnecessary the remaining attacks on the constitutionality of § 1305, *i.e.*, (1) vagueness and (2) the law set forth in *Marcus* v. *Search Warrant*, 367 U.S. 717 (1961), and *A Quantity of Copies of Books* v. *Kansas*, 378 U.S. 205 (1964).

Pursuant to the provisions of Rule 52 of the Federal Rules of Civil Procedure, this memorandum opinion shall constitute the court's findings of fact and conclusions of law.

In accordance with the provisions of Rule 58, a judgment shall be separately prepared and entered as follows:

"1. Pursuant to 28 U.S.C. § 1253, this is an order in a civil action heard and determined by a district court of three judges granting a permanent injunction after notice and hearing.

"2. The United States and its agents are restrained and enjoined from enforcing the provisions of 19 U.S.C. § 1305 against the claimant Milton Luros, in relation to the 37 photographs seized by customs agents in Los Angeles, California, on October 24, 1969.

"3. The United States shall deliver said photographs to the claimant.

"4. 19 U.S.C. § 1305, on its face and as construed and applied, violates the rights guaranteed to the claimant under the free speech and press and due process provisions of the First and Fifth Amendments to the United States Constitution.

"5. The enforcement of this judgment shall be stayed for a period of 30 days, in order to preserve to the government its right of appeal."

Dated this 27th day of January, 1970.

/s/ Warren J. Ferguson
WARREN J. FERGUSON
United States District Judge

We Concur:

/s/ Stanley N. Barnes
STANLEY N. BARNES
United States Circuit Judge

/s/ Jesse W. Curtis
JESSE W. CURTIS
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

Civil No. 69-2242-F

UNITED STATES OF AMERICA, PLAINTIFF

v.

THIRTY-SEVEN (37) PHOTOGRAPHS, DEFENDANTS, MILTON LUROS, CLAIMANT

JUDGMENT ON COUNTERCLAIM

The court having filed its memorandum opinion which constitutes its findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure, and in accordance therewith, judgment is decreed in favor of the claimant, Milton Luros, on his counterclaim filed November 14, 1969, and against the United States of America, as follows:

1. Pursuant to 28 U.S.C. § 1253, this is an order in a civil action heard and determined by a district court of three judges granting a permanent injunction after notice and hearing.

2. The United States and its agents are restrained and enjoined from enforcing the provisions of 19 U.S.C. § 1305 against the claimant Milton Luros, in relation to the 37 photographs seized by customs agents in Los Angeles, California, on October 24, 1969.

3. The United States shall deliver said photographs to the claimant.

4. 19 U.S.C. § 1305, on its face and as construed and applied, violates the rights guaranteed to the

claimant under the free speech and press and due process provisions of the First and Fifth Amendments to the United States Constitution.

5. The enforcement of this judgment shall be stayed for a period of 30 days, in order to preserve to the government its right of appeal.

Dated this 27th day of January, 1970.

/s/ Stanley N. Barnes
STANLEY N. BARNES
United States Circuit Judge

/s/ Jesse W. Curtis
JESSE W. CURTIS
United States District Judge

/s/ Warren J. Ferguson
WARREN J. FERGUSON
United States District Judge

APPENDIX C

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Attorney for Defendants and Claimant

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 69-2242-F

UNITED STATES OF AMERICA, PLAINTIFF

vs.

THIRTY-SEVEN (37) PHOTOGRAPHS, DEFENDANTS,
MILTON LUROS, CLAIMANT

STIPULATION OF FACTS IN REGARD
TO THE COUNTER-CLAIM

PURSUANT TO ORDER of the Court dated November 26, 1969, the parties hereto, through their respective counsel, stipulate to the following facts of the case in regard to the Counter-Claim:

1. On or about October 24, 1969, the claimant, Milton Luros, a citizen of the United States, returned to this country, following a visit to Europe. He arrived at Los Angeles, California on TWA Flight No. 761.

2. On October 24, 1969, Customs agents in Los Angeles, California seized from Milton Luros the 37 photographs named herein, together with a book en-

titled *Forbidden Erotica* by Rowlansan, a book album of the works of Peter Fende, and a "girlie" magazine. Attached hereto as APPENDIX A is Customs Receipt No. 586522.

3. On or about October 31, 1969, the District Director of the Bureau of Customs wrote claimant, advising him that the Bureau of Customs had referred the matter to the United States Attorney for the Central District of California for forfeiture action. A copy of the said letter is attached hereto as APPENDIX B.

4. On or about November 4, 1969, Stanley Fleishman, attorney for claimant, Milton Luros, wrote to the District Director of the Bureau of Customs requesting the forthwith delivery of the seized material. A copy of the said letter is attached hereto as APPENDIX C.

5. On or about November 5, 1969, Larry Dier, Assistant U. S. Attorney, released to Stanley Fleishman, attorney for claimant, Milton Luros, the following material, seized by Customs on October 24, 1969, as stated above: a book entitled *Forbidden Erotica* by Rowlansan, a book album of the works of Peter Fende, and a "girlie" magazine. A copy of a Release is attached hereto as APPENDIX D.

6. On or about November 6, 1969, the plaintiff instituted the within action.

7. On or about November 14, 1969, defendants and claimant filed an Answer and Counter-Claim.

8. Some or all of the 37 photographs seized were intended to be incorporated in a hard cover edition of *The Kama Sutra of Vatsyayana*, which book describes candidly a large number of sexual positions. The book has been distributed widely throughout the Nation and has been acclaimed as a work of substantial value. At the time of the seizure of the 37

photographs, the claimant, Milton Luros, advised the Customs Inspector that at least some of the photographs were intended for inclusion in the book *The Kama Sutra*. Claimant Milton Luros showed the Customs inspector the title pages of The Kama Sutra which the photographs were to accompany, and requested the Customs inspector to keep the photographs and title pages together. This the Customs inspector declined to do. Attached to the original of this Stipulation are the cover pages of The Kama Sutra as APPENDIX E. Attached to the copy of the Stipulation are xerox copies thereof.

DATED: This 15th day of December, 1969.

/s/ Stanley Fleishman
STANLEY FLEISHMAN
Attorney for Defendants
and Claimant

DATED: This 19th day of December, 1969.

WM. MATTHEW BYRNE, JR.
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant U. S. Attorney,
Chief, Civil Division
LARRY L. DIER
Assistant U. S. Attorney

By /s/ Larry L. Dier
LARRY L. DIER
Attorneys for Plaintiff

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 382777 642

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

IN THE

Supreme Court of the United States

October Term, 1969
No. 1475

UNITED STATES OF AMERICA,

Appellant,

vs.

THIRTY-SEVEN (37) PHOTOGRAPHS, MILTON LUROS, CLAIMANT,

Appellees.

On Appeal From the United States District Court for the Central District of California.

MOTION TO AFFIRM.

Pursuant to Rule 16(1)(c) of the Rules of this Court, appellees move that the judgment of the district court be affirmed.

Statement.

On October 24, 1969, customs agents in Los Angeles, California, seized from the appellee Luros, a citizen of the United States, a book, album, magazine and thirty-seven photographs (Jurisdictional Statement, Appendix C, pp. 22-23). Appellee Luros was returning to this country following a visit to Europe and the material was seized upon his return. On October 31, 1969, the District Director of the Bureau of Customs advised that the Bureau had referred the matter to the United

States Attorney for the Central District of California for forfeiture action (*Id.* pp. 22-23). On November 4, 1969, the attorney for appellees wrote to the District Director of the Bureau of Customs requesting the forthwith delivery of the seized material. On November 5, 1969, the United States Attorney, by his assistant, released to attorney for appellees all the material which had been seized by customs except the thirty-seven photographs (*Id.* p. 23). On November 6, 1969, the Government filed its complaint seeking judicial approval to enforce the forfeiture of the photographs. On November 14, 1969, appellees filed their answer and counterclaim (*Id.* p. 23). Pursuant to the prayer of the appellees contained in their counterclaim, a three-judge district court (Ferguson, Barnes, Curtis, JJ.) was convened pursuant to 28 U.S.C. §§ 2282 and 2284 to determine whether the Government should be enjoined from enforcing 19 U.S.C. § 1305 (*Id.* p. 15). On January 27, 1970, the three-judge court rendered an opinion (*Id.* pp. 15-19), holding that 19 U.S.C. § 1305, in the light of the rulings by this Court in *Stanley v. Georgia,* 394 U.S. 557 and *Freedman v. Maryland,* 380 U.S. 51, on its face and as construed and applied violates the rights guaranteed to appellees under the free speech and press and due process provisions of the First and Fifth Amendments (*Id.* p. 19). Accordingly, and in accordance with the findings of the district court, a judgment was entered (*Id.* pp. 20-21), restraining and enjoining the Government from enforcing the provisions of 19 U.S.C. § 1305 against appellees; directing the return of the photographs; and declaring that the statute on its face and as construed and applied violates the constitutional rights of appellees. The memorandum opinion of the district court is reported at 309 F. Supp. 36.

ARGUMENT.

The district court correctly concluded that 19 U.S.C. § 1305 is unconstitutional on its face because it fails to meet and conflicts with the standards and criteria enunciated by the Court in *Stanley v. Georgia*, 394 U.S. 557, and *Freedman v. Maryland*, 380 U.S. 51. The points raised by appellant are not sufficiently substantial to warrant plenary consideration by this Court. Accordingly, it is submitted it would be appropriate for the Court to affirm the judgment below summarily.

1. In mounting its attack upon the judgment of the district court, the Government commences with the assertion that the importation of an allegedly obscene item "for private, non-commercial use by the importer himself" (Jurisdictional Statement, p. 8) is unlawful and without constitutional protection. It is stated that the decision of the Court in *Stanley* does not control "even as to private, non-commercial importations" (*Id.* p. 9). These conclusions are premised upon the argument that in *Stanley* "there is no right to receive obscene matter, as such" (*Id.* p. 8).

Stanley does not stand alone. The decision represents the latest stage of the judicial process marking out the constitutional safeguards essential to protect freedom of expression in matters pertaining to problems of sex. Thus, the decision in *Roth v. United States*, 354 U.S. 476, while declining to give First Amendment protection to "obscenity", nevertheless admonished that sex and obscenity were not synonymous; that the standards for judging obscenity must safeguard the protection of the freedoms of speech and press; that a test which permitted the suppression of material if any portion of the material was deemed likely

to corrupt highly susceptible persons was unconstitutionally restrictive.

The rulings which followed *Roth* plainly demonstrated the difficulty of reconciling the standards and criteria for judging obscenity enunciated in *Roth* with the limitations on governmental power contained in the First and Fourteenth Amendments to the Constitution. A definition of "obscenity" as a workable principle has appeared almost impossible to promulgate, and members of this Court, as well as state and federal courts, have acknowledged the need for a reexamination and refinement of the standards for judging obscenity.

In *Jacobellis v. Ohio,* 378 U.S. 184, the Court was compelled to admonish that any attempt to "weigh" the social value of alleged obscene material against prurient appeal would undermine freedom of expression. In *Memoirs v. Massachusetts,* 383 U.S. 413, the Court emphasized that each of the three criteria for judging obscenity were to be applied independently, and that material could not be proscribed unless "found to be utterly without redeeming social value". 383 U.S. at 419.

Finally, the *per curiam* opinion in *Redrup v. New York,* 386 U.S. 767, acknowledged the differing constitutional views held by members of the Court in the obscenity area. It was stated that whichever constitutional view was brought to bear upon the cases before the Court in *Redrup,* the judgments could not stand; that "the distribution of the publications" in each of the cases was protected by the First and Fourteenth Amendments from governmental suppression. 386 U.S. at 770. Moreover, the *per curiam* opinion pointedly

observed that "in none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles"; "in none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it"; "and in none was there evidence of the sort of 'pandering' which the Court found significant in Ginzburg v. United States". 386 U.S. at 769.

2. Contrary to the Government's assertion, the right to receive information and ideas, regardless of their social value, was the fundamental right which the Court sought to protect in *Stanley*, although that basic right took on "an added dimension" in the context of the case (possession of obscene materials in the privacy of a home). The assertion of a governmental interest in dealing with the problem of obscenity could not in every context, the Court stated, be insulated from all constitutional protections. "Neither *Roth* nor any other decision of this Court reaches that far". 394 U.S. at 563. "It is now well established that the Constitution protects the right to receive information and ideas. 'This freedom [of speech and press] * * * necessarily protects the right to receive * * *.' * * * This right to receive information and ideas, regardless of their social worth, * * * is fundamental to our free society." 394 U.S. at 564.

In *Stanley* the Court could find no countervailing State interest justifying restriction of the aforesaid fundamental rights. The mere categorization of the material as "obscene" was insufficient; the claim that the State had the right to control the moral content of a person's thoughts was inconsistent with the philosophy

of the First Amendment; the assertion by the State that exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence was rejected because "among free men, the deterents ordinarily to be applied to prevent crime are education and punishment for violations of the law." The only evils which the State might have a right to prevent, the distribution of obscene material to minors or the distribution in such a manner as to invade the privacy or sensibilities of the general public, were not present in the context of private consumption of ideas and information. 394 U.S. at 565-567.

3. The argument of the Government that a citizen may not validly import or receive that which he has the freedom to possess undermines the rights which *Stanley* sought to protect. Freedom of speech and press "embraces the right to distribute literature, . . . and necessarily protects the right to receive it . . . Freedom to distribute information to every citizen wherever he desires to receive it is . . . clearly vital to the preservation of a free society." *Martin v. Struthers,* 319 U.S. 141, 143-147. "The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read . . ." *Griswold v. Connecticut,* 381 U.S. 479, 482. The freedom of an adult to the private possession of allegedly obscene material would be meaningless if Government were to deny to the citizen all access to such material. Without the right of citizens to import such materials, or to purchase and receive such materials by the ordinary means of circulation, the right of private possession would become meaningless. See *Lamont v. Postmaster General,* 381 U.S. 301.

Other arguments advanced by the Government appear equally tenuous. The issue here is not whether Congress, in the light of developing constitutional standards, may enact a statute narrow in scope affecting the importation of obscene materials (Jurisdictional Statement, p. 7); the question is whether the present statute, 19 U.S.C. § 1305, is unconstitutionally overbroad in the light of the decision in *Stanley*. Nor do we deal here with the "transportation of women in interstate or foreign commerce for immoral purposes" (*Id.*, p. 9); the issue in this case is whether the constitutional guarantees of freedom of speech and the press stand in the way of imposing restrictions upon a citizens's right to the private consumption of ideas and information. See *Smith v. California*, 361 U.S. 147, 152-153.

Finally, even if it be assumed that books and papers may be inspected at the borders of the country "if for nothing else than to see what may be concealed between their leaves" (Id., p. 9) it does not follow that books and papers may be confiscated and denied to citizens for private use if nothing is found concealed between the pages.[1]

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[1]At the time of the filing of the Jurisdictional Statement, the Government noted that the validity of the customs statute under *Stanley* was also pending before a three-judge court in the Southern District of New York. (p. 7, fn. 2). A decision by the court was rendered on June 8, 1970. *United States v. Various Articles of Obscene Merchandise*, 68 Civ. 2972. The court held that as applied to importation of obscene materials by a citizen for his own private use, the customs statute was unconstitutional. It was held that a statute which by its terms prohibits importation by an individual of obscene material for his own private use and enjoyment in his own home offends the First Amendment and must be held unconstitutional. Since the claimant was himself within the privileged area, and since the statute was narrowed by the court to forbid its application to him, the district court deemed it unnecessary to invalidate the entire statute. The court

(This footnote is continued on the next page)

4. The Government's argument that standing should be denied to appellees because of their admission that they imported the pictures in question for commercial purposes is without merit. In the area of freedom of expression it is well established that one has standing to challenge a statute on the ground of overbreadth with no requirement that such person attacking the statute demonstrate that his own specific conduct is privileged. With respect to overbroad statutes in the First Amendment area, it is not merely the possibility of arbitrary suppression by officials in particular cases, but the deterring and chilling effect inherent in the very existence of the statute that constitutes the danger to freedom of expression. *Thornhill v. Alabama,* 310 U.S. 88, 97-98; *Freedman v. Maryland,* 380 U.S. 51, 56; *Zwickler v. Koota,* 389 U.S. 241, 249-250; *NAACP v. Button,* 371 U.S. 415, 432-433; *Aptheker v. Secretary of State,* 378 U.S. 500; *Dombrowski v. Pfister,* 380 U.S. 479, 487.

The government argues that "where vagueness is absent, there is no spectre of a possible 'chilling effect' through uncertainty to justify an expansive attitude toward standing to raise the constitutional claims of others." (Jurisdictional Statement, p. 10). This argument suffers from a number of defects. In the first

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did suggest that obscene material, in certain situations, can now apparently invoke constitutional protection under *Stanley,* and for that reason 19 U.S.C. § 1305 may be unconstitutional even as it applies to importation for commercial distribution, in the absence of a government showing that one of the legitimate state interests summarized in *Redrup* will be infringed by commercial distribution subsequent to importation.

place, the threat of sanctions under an overbroad statute may deter the exercise of First Amendment freedoms as potently as an actual application of sanctions precisely because of the clarity of its language. See *Aptheker v. Secretary of State, supra,* at 515-517. In the second place, it ignores reality to assert that "vagueness is absent" in the obscenity area. Virtually every member of the Court has stressed the vagueness and uncertainty of the obscenity definition. The chilling effect of an overbroad statute under such circumstances is not only "possible"; it is certain.

Moreover, the government cannot seriously claim that the importation of obscene material for commercial purposes is the sort of "hard-core" conduct that would obviously be prohibited "under any construction" of the statute. (Jurisdictional Statement, p. 11). As *Redrup* and *Stanley* indicate, the state's interest in prohibiting the commercial distribution of obscene materials may be limited to minors and those persons upon whom the material is obtrusively forced. Mere commercial distribution to willing adults is plainly not "hard-core." We are not dealing here with "solicitors for gadgets and brushes"; we are dealing here with the unlimited power of the adult citizen to judge for himself what ideas, information and entertainment he will receive. See *Rowan v. United States Post Office Department,* ..... U.S. ....., 90 S.C. 1484.

5. The district court held additionally that 19 U.S.C. § 1305 failed to provide the procedural safeguards re-

quired by the First and Fifth Amendments. Pointing to the decision of the court in *Freedman*, the district court held that any restraint prior to judicial determination can be imposed only briefly, and that the censor in a specified brief period must seek judicial determination. The safeguards, the court stated, must be contained in the statute or in judicial rule. The court found that § 1305 is a system of censorship by customs agents, barren of such safeguards. (Jurisdictional Statement, Appendix A, pp. 17-18).

The Government argues that the statute meets procedural requirements even though the law does "not fix exact time limits" (*Id.*, p. 12), and despite the fact that from the date of the seizure on January 9, 1970, to the date of the court hearing, 76 days had passed. The district court stated below: "All concede that under present statutory procedures it could not have been accomplished any sooner." (*Id.*, p. 18). Nor does the Government deny that § 1305 does not prohibit customs agents from long delaying judicial determination. The discretion thus vested in the customs agents, without time limits fixed by the statute or by judicial rule, violates the First Amendment. *Freedman v. Maryland*, 380 U.S. 51, 56; *Teitel Film Corp. v. Cusack*, 390 U.S. 139; *Bantam Books v. Sullivan*, 372 U.S. 58. See Monaghan, *First Amendment "Due Process"*, 83 Harv. L.Rev. 518, 520-523 (1970).

6. The district court found it unnecessary to reach other issues raised by appellees in support of their

claims. (Jurisdictional Statement, Appendix A, pp. 16, 18). Without rejecting the argument, the court passed over appellees' contention that 19 U.S.C. § 1305 is unconstitutional because the statute purports to forbid the importation of obscene material even in the absence of any showing that the material is intended for distribution to minors or for distribution in a manner which intrudes upon the sensitivities or privacy of the general public. Appellees contend that the statute is thus constitutionally overbroad under the First Amendment and *Stanley*.[2]

Additionally appellees also urge the invalidity of the statute because the law purports to vest in customs officials discretion to seize books and other media of expression without an adversary hearing, in violation of the First and Fifth Amendments to the United States Constitution. *Marcus v. Search Warrants of Property*, 367 U.S. 717; *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205; *Lamont v. Postmaster General*, 381 U.S. 301.

Finally, appellees contend that the statute is unconstitutionally vague, failing to provide the precision necessary to safeguard the exercise of freedoms of speech and press. See, Justice Black in *Ginzburg v. United States*, 383 U.S. 463, 478-481; Justice Douglas in *Ginzburg v. United States*, 383 U.S. at 483; Justice Harlan in *Memoirs v. Massachusetts*, 383 U.S. 413, 455-

[2]This issue is discussed in the Brief of Mel S. Friedman, Esq. and Stanley Fleishman, Esq. as Amici Curiae in *Batchelor, et al. v. Stein*, October Term, 1969, No. 565.

456; Justice Stewart in *Jacobellis v. Ohio*, 378 U.S. 184, 197; Chief Justice Warren in *Jacobellis v. Ohio*, 378 U.S. at 200-201; *Per curiam* in *Redrup v. New York*, 386 U.S. 767, 770-771.

Conclusion.

For the foregoing reasons the judgment of the District Court should be affirmed.

Respectfully submitted,

STANLEY FLEISHMAN,
Attorney for Appellees.

SAM ROSENWEIN,
Of Counsel.

INDEX

410-752—70——1

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 133

UNITED STATES OF AMERICA, APPELLANT

v.

THIRTY-SEVEN (37) PHOTOGRAPHS, MILTON LUROS, CLAIMANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the three-judge District Court for the Central District of California (App. 24–27) is reported at 309 F. Supp. 36.

JURISDICTION

On January 27, 1970, a three-judge District Court in the Central District of California, convened pursuant to 28 U.S.C. 2282, entered a judgment permanently restraining the United States and its agents from enforcing against appellee the provisions of 19 U.S.C. 1305(a) (the customs obscenity statute) and declaring that the statute, on its face and as applied

in this case, violated the claimant's rights under the First and Fifth Amendments to the Constitution (App. 28). A notice of appeal to this Court was filed in the district court on February 26, 1970 (App. 29). Probable jurisdiction was noted on October 12, 1970 (App. 30). The jurisdiction of this Court rests on 28 U.S.C. 1253. See, *e.g.*, *Zemel* v. *Rusk*, 381 U.S. 1, 5–7; *Flast* v. *Cohen*, 392 U.S. 83, 90–91.

QUESTIONS PRESENTED

1. Whether the United States may validly prohibit the importation of obscene matter for subsequent commercial distribution.

2. Whether a person importing obscene matter for commercial distribution has standing to challenge a statute also prohibiting the importation of such matter for private use and, if so, whether the statute is valid.

3. Whether the statute prohibiting the importation of obscene matter into the United States, 19 U.S.C. 1305(a), provides adequate administrative and judicial safeguards.

STATUTE INVOLVED

19 U.S.C. 1305(a) provides in pertinent part:

> All persons are prohibited from importing into the United States from any foreign country * * * any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral * * *. No such articles wheth-

er imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the collector that the obscene or other prohibited articles contained in the package were inclosed therein without the knowledge or consent of the importer, owner, agent, or consignee, the entire contents of the package in which such articles are contained, shall be subject to seizure and forfeiture as hereinafter provided: * * * *Provided, further,* That the Secretary of the Treasury may, in his discretion, admit the so-called classics or books of recognized and established literary or scientific merit, but may, in his discretion, admit such classics or books only when imported for noncommercial purposes.

Upon the appearance of any such book or matter at any customs office, the same shall be seized and held by the collector to await the judgment of the district court as hereinafter provided; and no protest shall be taken to the United States Customs Court from the decision of the collector. Upon the seizure of such book or matter the collector shall transmit information thereof to the district attorney of the district in which is situated the office at which such seizure has taken place, who shall institute proceedings in the district court for the forfeiture, confiscation, and destruction of the book or matter seized. Upon the adjudication that such book or matter thus seized is of the character the entry of which is by this section prohibited, it shall be ordered destroyed and shall be destroyed. Upon adjudication that such book or

matter thus seized is not of the character the entry of which is by this section prohibited, it shall not be excluded from entry under the provisions of this section.

In any such proceeding any party in interest may upon demand have the facts at issue determined by a jury and any party may have an appeal or the right of review as in the case of ordinary actions or suits.

STATEMENT

The pertinent facts were stipulated in the district court (App. 15–16). They show that claimant Luros returned to this country from Europe by airplane on October 24, 1969, arriving at Los Angeles. During the customs inspection, customs agents seized from his luggage the thirty-seven photographs involved herein,[1] a book entitled *Forbidden Erotica,* a book album of the works of one Peter Fende, and a "girlie" magazine. It was stipulated that (App. 16):

> Some or all of the 37 photographs seized were intended to be incorporated in a hard cover edition of the *Kama Sutra of Vatsyayana,* which book describes candidly a large number of sexual positions. The book has been distributed widely throughout the Nation and has been acclaimed as a work of substantial value. At the time of the seizure of the 37 photographs, the claimant, Milton Luros, advised the Customs Inspector that at least some of the photographs were intended for inclusion in the book *The Kama Sutra.* * * *

[1] These photographs have been lodged with the Clerk of this Court.

On October 31, 1969, the District Director of the Bureau of Customs wrote Luros, advising him that the matter had been referred to the United States Attorney for forfeiture action. On November 4, 1969, Luros' attorney wrote the District Director demanding the return of the seized material. The following day, the United States Attorney's Office returned all the material seized except for the thirty-seven photographs. On November 6, 1969, the United States commenced the present action under 19 U.S.C. 1305(a) for forfeiture of the photographs as obscene (App. 2). Luros filed an answer and counterclaim on November 14, 1969, contending that the photographs were not obscene and that 19 U.S.C. 1305(a) was unconstitutional (*ibid.*). He moved to convene a three-judge district court under 28 U.S.C. 2282 to resolve these issues (App. 9). The motion was heard on November 18, 1969, and an order to convene a three-judge court was issued on November 20, 1969 (App. 12–13). The hearing before the three-judge court was held on January 9, 1970 (App. 14–15).

The court issued its opinion on January 27, 1970. Tacitly assuming that the pictures seized here are obscene, the court nonetheless ruled that the statute is unconstitutional on its face and as applied (App. 24–27). The court noted that the statute reaches "all obscene works" and "prohibits an adult from importing an obscene book or picture for private reading or viewing" (App. 25). It therefore concluded that the statute is invalid on its face under this Court's decision in *Stanley* v. *Georgia*, 394 U.S. 557 (*ibid*).

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Despite the fact that the claimant stipulated that he had imported the pictures for commercial, not private, use, the court held that he had standing to attack the statute on the basis of its application to importation for private use (App. 25). Relying upon *Freedman* v. *Maryland,* 380 U.S. 51, the court also ruled that the statute violated the due process clause because it fails to guarantee that any restraint on allegedly obscene material will be imposed for only "a specified brief period" prior to the judicial resolution of the issue of obscenity (App. 26).

SUMMARY OF ARGUMENT

This case involves the constitutional validity of the federal government's prohibition on importation of obscene material and the procedural arrangements for administrative and judicial decision of the issue whether an item which has been seized at customs is obscene.

The court below interpreted this Court's decision in *Stanley* v. *Georgia,* 394 U.S. 557, as establishing a right to obtain obscene matter for personal use. Appellee's importation admittedly was for commercial use. But because the statute at issue, 19 U.S.C. 1305(a), prohibits importation of obscene matter, irrespective of its intended use, the court held that it was invalid on its face. The court alternatively ruled, in reliance upon *Freedman* v. *Maryland,* 380 U.S. 51, that the seizure-forfeiture procedure under the statute violated due process because it lacked legislatively prescribed maximum time periods during which the government was

required to take administrative steps and ultimately seek judicial resolution of the issue of obscenity.

I

Our primary contention is that the established power of the government to control importation of goods into the United States, under which obscene matter has long been excluded, was in no way impaired by this Court's decision in *Stanley* v. *Georgia, supra.* That decision held that the State could not punish an individual for possession of obscene matter in the privacy of his dwelling. It rested upon the right of the individual to be free from government intrusion into his home and private thoughts. This protection of the individual does not, however, extend to the material itself. The *Stanley* opinion expressly disclaimed overruling or limitation of *Roth* v. *United States,* 354 U.S. 476, which had upheld government prohibition of the public distribution of obscene matter because such matter was not protected by the First Amendment. Since the obscene material is not protected, the right not to be punished for possessing it in one's home does not carry with it a right to obtain or to distribute it commercially.

The protection of the individual upon which *Stanley* was based, moreover, does not apply to prevent seizure of obscene matter at customs, even if the individual claims it is intended for personal use. The respective interests of the government and the individual are different at customs than when the government seeks to intrude into the privacy of the home. One's belongings traditionally are subject to close examination

at customs in order that the government effectively can control importation of goods into the country. Forfeiture proceedings are *in rem* against the obscene matter; no fine or criminal penalty is imposed on the individual. And the degree of assurance that material seized at customs is intended only for private use is less than it is with respect to matter which is discovered only by invasion of an individual's home.

II

Even if *Stanley* requires the government to refrain from interfering with the importation of obscene material for private use, it does not forbid prohibiting importation for commercial purposes. The court below apparently assumed as much. This being so, however, that court should have upheld the statute as applied to appellee, who admittedly was an importer for commercial purposes. Congress intended such an approach in the event the statute was held unconstitutional as applied to some cases, for it included a separability provision in the statutory scheme.

Appellee did not, in fact, have standing to assert the unconstitutionality of the statute as applied to private importers. Although this Court has allowed parties standing to challenge certain statutes affecting First Amendment rights on their face when their own activity could, in any event, be constitutionally prohibited, it has done so only when the statutes are vague, as well as overly broad. But the statute here is certainly not vague. The categories of personal and commercial use may be readily distinguished so that there will be no uncertainty as to the reach of the statute

if it is held valid only when applied to commercial importation.

III

The procedural safeguards which are necessary under *Freedman* v. *Maryland, supra,* exist under Section 1305(a) notwithstanding the fact that rigid time limits have not been set upon the forfeiture proceedings. The statute insures the government will obtain a prompt judicial determination as to whether material it seizes and wishes to destroy is obscene. The statute requires the collector of customs to report seizures to the district attorney who, in turn, must institute forfeiture proceedings forthwith. Judicial interpretation, as well as the legislative history of the statute, has made it plain that all the steps in the forfeiture process must be taken as rapidly as is possible consistent with responsible adjudication on the issue of obscenity. Decisions upholding the procedure of the statute on its face provide sufficient indication of acceptable time periods. The time between seizure and court decision in this case—three months, a part of which was due to the convening of a three-judge court—is wholly consonant with the approach of those decisions and the due process requirements of *Freedman.*

ARGUMENT

I. THE POWER OF THE UNITED STATES TO PROHIBIT THE IMPORTATION OF OBSCENE MATTER WAS NOT IMPAIRED BY THIS COURT'S DECISION IN *STANLEY* v. *GEORGIA*

Article I, Section 8 of the Constitution grants Congress the power to "regulate commerce with foreign Nations." The only limitations on this power are those

contained in other provisions of the Constitution. Among other things, it includes the power to "exclude merchandise at discretion." *Board of Trustees* v. *United States,* 289 U.S. 48, 56–57; *Brolan* v. *United States,* 236 U.S. 216, 218–219; *Weber* v. *Freed,* 239 U.S. 325, 329; see also *Minor* v. *United States,* 396 U.S. 87, 98, n. 13. Under this power, Congress has prohibited importation of various types of obscene material into this country since 1842. See 5 Stat. 566.[2] This Court has long recognized that such material is, in effect, "merchandise"—unprotected by the First Amendment and fully subject to the government's power to exclude. *E.g., Roth* v. *United States,* 354 U.S. 476, 481; *Ginzburg* v. *United States,* 383 U.S. 463, 474–475.

A. The court below is one of a number which recently have interpreted this Court's decision in *Stanley* v. *Georgia,* 394 U.S. 557, as impairing those principles—despite the *Stanley* opinion's express statement that the *Roth* holding was "not impaired." 394 U.S. at 568. See, *e.g., Byrne* v. *Karalexis,* No. 83, this Term; *United States* v. *Reidel,* No. 534, this Term; *United States* v. *Various Articles of "Obscene" Merchandise,* No. 706, this Term. In the government's brief *amicus curiae* in *Byrne, supra,* we undertake to show how that failure to honor the explicit reservation in *Stanley*—made not just once, but in several passages in the opinion, 394 U.S. at 563, 567, 568—arises out of a failure to recognize the opinion's focus

[2] A brief history of federal obscenity legislation is detailed in the government's brief in the *Roth* case (No. 582, O.T., 1956), pp. 79–81.

on the privacy of the individual whose possession of obscene matter was there made a crime.

Here, we stress another facet of that decision, expanding upon our analysis in *Byrne*. In referring to First Amendment rights, the *Stanley* opinion is careful to refer to those rights as associated with Mr. Stanley, the individual accused of crime, and *not* as the product of any First Amendment status inhering in the materials themselves. It was Mr. Stanley who was to be protected, not the materials he possessed; and the right enunciated was to be free of state inquiry into the contents of his library—an inquiry which, under the circumstances of that case, could have no other purpose than supervision of the morality of his own, individual thoughts. If the materials are not protected, there is no "right to receive" them as such; and protection of the individual's right from inquiry into his private thoughts in no way implies that the community must tolerate public distribution and availability of materials which, in themselves, the First Amendment does not protect. The fact which distinguishes *Stanley* from all the pending cases is that there the community did not know, and had no right to know, independent of an asserted interest in Mr. Stanley's personal morals and thoughts, what it was that he possessed.

In *Stanley,* state agents entered appellant's home under a search warrant which authorized them to seize evidence of bookmaking. In the course of the search, entirely by accident and without suspecting what they would find, they discovered a roll of motion picture film and a projector. They viewed the film, concluded

it was obscene, and arrested appellant. He was convicted under state law for "knowingly hav[ing] possession of * * * obscene matter." See 394 U.S. at 558–559. Proceeding on the assumption that the film was obscene under "any of the tests advanced by members of this Court" (394 U.S. at 559, n. 2), this Court nonetheless reversed the conviction.

The express and limited holding of the majority was that "the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime" (*id.* at 568). The court below, however, apparently viewed the statement in *Stanley* that the "Constitution protects the right to receive information and ideas * * * regardless of their social worth," 394 U.S. at 564, as the operative rationale of the decision. It concluded from this that the statute could not constitutionally deprive "a person who may constitutionally view pictures of the right to receive them" (App. 25).

This interpretation misconceives the basis of the *Stanley* decision. The "right to receive" of which this Court spoke could not have been intended to encompass a right to receive obscenity, a class of material which *Stanley* itself recognized as outside the scope of First Amendment protection. See *Roth* v. *United States, supra;* cf. *Valentine* v. *Chrestensen,* 316 U.S. 52. Recognition of such a right would emasculate *Roth's* holding that the government does have power to regulate the public distribution of obscene matter (354 U.S. at 491–492), something that the Court was careful to disclaim. The decision in *Stanley* rested essentially on the right of the indi-

vidual to be free from interference by government with the privacy of his home and the "moral content of * * * [his] thoughts." 394 U.S. at 565. Thus, the Court asserted that "[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." *Ibid.*

The lack of authority to punish an individual for possession of obscene materials in his home does not correlatively invest the material itself with First Amendment protection it otherwise does not enjoy. And the protection of privacy does not require recognition of a right to obtain or dispense obscene material. The claim of a "right to receive" obscene matter, as one commentator has stated:

> misconceives the reasons for which, according to *Stanley*, society stays its hand in the case of private indulgence. It does not acknowledge a "right" to undergo pornographic experiences in private any more than the statute of frauds grants a "right" to breach oral contracts. The law tolerates both because of uniquely remedial considerations. The cure would be worse than the disease. The recognition of this does not mean that society either values the disease or considers it with indifference. Should the repellant activity surface in circumstances not relevant to privacy the law will step in. The privilege recognized in *Stanley* is, in short, a shield for the private citizen, not a sword for the purveyor. [Gegan, *The Twilight of Nonspeech*, 15 Catholic Lawyer 210, 218–219 (1969).]

The power of government to prohibit distribution and possession of unprotected obscene matter is thus impaired by *Stanley* only to the extent that it is enforced by an improper invasion of the right of the individual "to be let alone—the most comprehensive of rights and the right most valued by civilized men" *Olmstead* v. *United States,* 277 U.S. 438, 478 (Brandeis, J., dissenting); see 394 U.S. at 564. *Stanley* is an application of the principle that

> The secular state is not an examiner of consciences: it must operate in the realm of behavior, of overt actions, and where it does so operate, not only the underlying, moral purpose of its operations, but also the *choice of means* becomes relevant to any Constitutional judgment on what is done. * * * [*Poe* v. *Ullman,* 367 U.S. 497, 547 (Harlan, J., dissenting).]

That principle was endorsed by the Court in *Griswold* v. *Connecticut,* 381 U.S. 479.[28]

B. Viewing *Stanley* thus, it might nonetheless be contended that customs inspection is one of the places where the "right to be let alone" as to written materials must be honored, at least so far as those materials are said to be meant for private use once imported. Of course, the materials here are avowedly for public, commercial use, and we shall show why an

[28] It is interesting to note that the issue decided in *Stanley* was the principal one raised, on virtually identical facts, in *Mapp* v. *Ohio,* 367 U.S. 643, 673 (Harlan, J., dissenting). The Court did not reach that issue in *Mapp,* reversing the conviction solely on Fourth Amendment grounds. The same term, the Court also refrained from deciding the comparable issue concerning punishment for use by married couples in the privacy of their own homes of contraceptive devices. *Poe* v. *Ullman, supra.* The issue was, of course, subsequently decided in *Griswold* v. *Connecticut, supra,* which we believe is a critical foundation of the *Stanley* decision.

importer for such purposes may not avail himself of any private right to import. But we further contend, for several reasons, that the *Stanley* rationale does not extend to importation even for avowedly personal use.[3]

First, there is no "right to be let alone" in a customs search at the nation's borders, which is very different from a police search through a private library. An individual's luggage, as well as his person, has traditionally been subject to examination by governmental authorities at customs without probable cause or a search warrant; this is permitted by statutes going back more than a hundred years. 19 U.S.C. 482, 1582. *Carroll* v. *United States,* 267 U.S. 132, 150–154; *Boyd* v. *United States,* 116 U.S. 616, 623–624; *Alexander* v. *United States,* 362 F. 2d 379, 382 (C.A. 9), certiorari denied, 385 U.S. 977. Cf. *Colonnade Catering Corp.* v. *United States,* 397 U.S. 72, 76. Such searches are necessary unless the government's legitimate objective of preventing smuggling is to be severely impaired. Because of this paramount governmental interest, property which in other circumstances is afforded greater protection is not protected by the right of privacy at the border. Books and papers may be examined if for no other reason than to see what may be concealed between their leaves.

Second, the customs procedures here are procedures *in rem*—strictly against the materials (which *Stanley* does not protect) and not against the individual seek-

[3] The question need not be reached in this case; but if not reached, we note that it is pending in two other cases now before the Court at the jurisdictional stage: *United States* v. *Various Articles of "Obscene" Merchandise, supra; United States* v. *12 200-ft. Reels of Super 8 mm. Film,* No. 364, this Term.

ing to import them. Mr. Stanley was accused of a crime, for which he might have been punished by a fine or sentence. Here, no crime is charged; the entire issue is whether certain merchandise, which by hypothesis has no saving content of ideas or other merit, must be admitted into the country. The power of Congress to exclude any matter from entry, save as it may be protected by the Constitution, is complete. It is not a question of attempting to regulate private morals or thought by criminal sanction; Congress is exercising its undoubted power to exclude what it deems noxious to the nation as a whole and which, in itself, can claim no First Amendment protection. See *Roth, supra,* 354 U.S. at 485; *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 571–572.

Finally, there is a rational basis for Congress to conclude that public morality—not simply an individual's private thought—is threatened even by importations avowedly for personal use. When, as in *Stanley,* material is found by accident hidden in a desk in a private home, one may have considerable confidence that it is meant only for private use. At the country's borders, before it has reached its ultimate destination, no such confidence is possible. Save in the case of bulk shipments or matter inherently commercial, such as 35 mm. motion picture film, noncommercial importations are not self-identifying. Two or three copies of catalogues together with samples, see, *e.g., 12 200-Ft. Reels, etc., supra,* might fuel a sizeable mail-order operation. Once permitted past the customs barrier, they cannot be retrieved no matter how they are

used. The assertion that the materials are intended for private use is easy for an importer to make. To adopt a rule which makes that assertion sufficient, as a matter of constitutional law, to force entry would be to deprive customs officers of necessary flexibility in administering the customs statute.[4]

II. APPELLEE, WHO ADMITTED THAT HE WAS IMPORTING THE MATERIAL HERE FOR SUBSEQUENT COMMERCIAL DISTRIBUTION, LACKS STANDING TO CHALLENGE THE CUSTOMS OBSCENITY STATUTE ON THE GROUND THAT IT ALSO PROHIBITS THE IMPORTATION OF OBSCENE MATTER FOR STRICTLY PRIVATE USE

Even assuming, *arguendo,* that there is a right to import obscene material solely for private use, the government may nonetheless prohibit importation of obscene material, such as that involved in this case, which is intended for commercial distribution. See *United States* v. *Articles of "Obscene" Merchandise,*

[4] As this Court has previously been informed, the government's policy in prosecuting violations of the mail obscenity statute, 18 U.S.C. 1461, is not to prosecute mailings which are consensual, adult, and private in nature. See *Redmond* v. *United States*, 384 U.S. 264. While such a policy might be wise in the customs area, and undoubtedly is followed by individual customs officers, officially there is no such policy at present. Our point here is that, in view of the danger of false statements in the customs process and the limitations on information available to the customs officials regarding actual intended use, there is no constitutional requirement that material be admitted once it is promised that it will be used only privately. The statute itself, in providing for importation of "the so-called classics * * *," twice emphasizes the need for discretion on this issue. While that exception undoubtedly has been deprived of operative impact by the trend of this Court's decision, the emphasis is nonetheless instructive.

315 F. Supp. 191 (S.D. N.Y.), pending on jurisdictional statement, No. 706, this Term. Any other rule would make meaningless the reference to *Roth* in *Stanley*. Indeed, the court below assumed that a customs statute limited to importations for commercial use might be valid; it based its decision on the statute's application also to importations for private use, and held the entire statute invalid on that ground alone. This conclusion ignored the express provision of the Congress that if the statute should be held invalid as applied to "any person or circumstances * * * the application of such provision to other persons or circumstances shall not be affected thereby." 19 U.S.C. 1652. But beyond that, we submit, whatever freedom individuals might have to import obscene materials for personal use, commercial importers have no standing to assert those rights in behalf of their own, quite different, activities.

It is true that when First Amendment freedoms have been involved, this Court has relaxed to some extent the traditional rule of standing, see, *e.g.*, *United States* v. *Raines*, 362 U.S. 17, 21, and "allowed attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Dombrowski* v. *Pfister*, 380 U.S. 479, 486; *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 432–433; *Thornhill* v. *Alabama*, 310 U.S. 88, 97–98. The reason for this relaxed rule of standing is the possible "chilling effect" of such statutes on the exercise of First Amendment rights.

Permitting individuals to attack such a statute, irrespective of its application to their particular activity, is a means of lessening substantially the prospect that persons whose activity is constitutionally protected will refrain from exercising their rights for fear of criminal sanction. See *Thornhill* v. *Alabama,* 310 U.S. 88, 97–98; *Dombrowski* v. *Pfister,* 380 U.S. 479, 486–487. The cases in which this Court has applied this rationale, however, have involved statutes which are vague, as well as overbroad. *Thornhill* v. *Alabama, supra; Dombrowski* v. *Pfister, supra.*[5] And it is the vagueness which causes the "chilling effect" justifying the more permissive approach.

Even if the customs obscenity statute were held to be overbroad, having valid application to commercial importation but being invalid as applied to importa-

[5] *Freedman* v. *Maryland*, 380 U.S. 51, on which the court below relied, may appear to be an exception. But that case held only that any claimant may challenge the *procedures* of a licensing statute granting broad power to seize allegedly obscene material, where the sweeping nature of those procedures, on their face, substantially inhibits the rights of those who may be entitled to First Amendment protection. See 380 U.S. at 56–57; cf. *Interstate Circuit* v. *Dallas*, 390 U.S. 676, 683–684. Accordingly, we concede appellee's standing to challenge the *procedures* of Section 1305, whether or not the materials he seeks to import are in fact obscene; he would, indeed, be threatened if the statute involved excessive *procedures*, though we contend that it does not. And appellee would have standing to challenge the application of Section 1305 if it embodied a "vague" standard, as did the cases in the text. But here the *only* contention is overbreadth, that in addition to assumedly proper application to appellee, the statute improperly applies to some others. *Freedman* is no authority for the proposition that appellee has standing to make that limited claim.

tion for personal use, it is not vague. The distinction between intended commercial and personal use is sufficiently clear to remove any uncertainty regarding the reach of the statute if valid only in application to commerce. Similarly, the statute is not unconstitutionally vague in its designation of what materials may not be imported. That issue was settled by *Roth*, where the Court held that the term "obscene" was not impermissibly vague. 354 U.S. at 491–492. The Court then adopted, and has since consistently adhered to, an approach to the obscenity question in which the issue is not the invalidity of statutory provisions on their face, but whether the provisions are invalid as applied. *E.g., Ginzburg* v. *United States*, 383 U.S. 463, 475; *Mishkin* v. *New York*, 383 U.S. 502, 507; *Redrup* v. *New York*, 386 U.S. 767; Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 884–887, 921–922. The statute does not, in short, chill the exercise of First Amendment rights.

There is consequently no reason to permit a commercial importer, whose activity is the "sort of 'hard-core' conduct that would obviously be prohibited under any construction" of the statute, *Dombrowski* v. *Pfister, supra*, 380 U.S. at 491–492, to escape application of the statute to him by challenging the validity of its possible application to a manifestly different situation.[6] It would be improper to strike down the entire

[6] In analogous commercial solicitation cases, this Court has held that it is "not open to the solicitors for gadgets or brushes" to assert the First Amendment claims of non-commercial distributors of pamphlets or magazines. Compare *Breard* v. *Alexandria*, 341 U.S. 622, 641, *Valentine* v. *Chresten-*

statute at the behest of one to whom it validly applies, *Roth* v. *United States, supra,* when any overbreadth can be cured by a restrictive interpretation which will avoid constitutional doubt or by excising invalid portions of the statute. 19 U.S.C. 1652, *supra.* See *Scales* v. *United States,* 367 U.S. 203; *Noto* v. *United States,* 367 U.S. 290; Sedler, *Standing to Assert Jus Tertii in the Supreme Court,* 71 Yale L.J. 599; Note, *supra,* 83 Harv. L. Rev. at 907–910, 918–923. This approach was recently adopted, as to this very statute, by a three-judge district court in the Southern District of New York. *United States* v. *Articles of "Obscene" Merchandise, supra,* 315 F. Supp. at 196–197.[7]

III. THE CUSTOMS STATUTE PROHIBITING THE IMPORTATION OF OBSCENE MATTER PROVIDES ADEQUATE ADMINISTRATIVE AND JUDICIAL SAFEGUARDS FOR THE DETERMINATION OF WHETHER THE IMPORTED MATERIAL IS OBSCENE

Section 1305(a) authorizes administrative detention of material seized at customs for only a short period of time preliminary to a prompt judicial determination of the question whether the material is obscene, and places the burden of seeking that determination

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sen, 316 U.S. 52, and *Ginzburg* v. *United States,* 383 U.S. 463, 475, with *Martin* v. *Struthers,* 319 U.S. 141. See also Note, *supra,* 83 Harv. L. Rev. at 908–910; *New York State Broadcasters* v. *United States,* 414 F. 2d 990 (C.A. 2), certiorari denied, 396 U.S. 1061.

[7] The court cited *United States* v. *One Carton Positive Motion Picture Film Entitled "491"* 367 F. 2d 889, 898 (C.A. 2) and *United States* v. *A Motion Picture Film Entitled "Pattern of Evil,"* 304 F. Supp. 197 (S.D. N.Y.), as examples of decisions upholding the validity of 19 U.S.C. 1305(a) as applied to commercial importation of obscenity.

on the government. The court below, relying on *Freedman* v. *Maryland,* 380 U.S. 51, held this procedural scheme unconstitutional for failure to establish a "specified brief period" of time limiting the duration of the proceedings (App. 26). We believe, however, that the seizure and forfeiture provisions of the statute are not invalid because Congress did not fix exact time limits. See *Interstate Circuit* v. *Dallas,* 390 U.S. 676, 678–680, 690, n. 22.

In *Freedman,* a state statute required motion picture exhibitors to submit all films to a board of censors for approval prior to exhibition. 380 U.S. at 52, 54. There was no time limit on completion of the reviewing board's action and the burden of initiating judicial review of its decision was on the exhibitor. *Id.* at 55. This Court held this system invalid because it lacked necessary "procedural safeguards designed to obviate the dangers of a censorship system." *Id.* at 58. Specifically, it did not place upon the censor the burden of proving that the film is not protected expression; there was no assurance "by statute or authoritative judicial construction, that the censor will, within a specified brief period," either approve the film or go to court to restrain its exhibition; nor was there assurance that any "restraint imposed in advance of a final judicial determination * * * [is] limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution"; and, finally, there was no guarantee of a "prompt final judicial decision." *Id.* at 58–59.

The Court subsequently invalidated a Chicago prior

censorship system because the period fixed for administrative determination of obscenity (50 to 57 days) was excessive and because there was no provision for prompt adjudication by the courts. *Teitel Film Corp.* v. *Cusack,* 390 U.S. 139. By contrast, in *Interstate Circuit* v. *Dallas,* 390 U.S. 676, the Court approved a city ordinance requiring prior classification of motion picture films where the total administrative period, although not entirely fixed, was quite short,[8] and there was provision for speedy judicial resolution of the issue. Similarly, the procedural system in this case affords the safeguards which *Freedman* and its progeny require. The government bears the burden of action and proof throughout, and must secure judicial as well as administrative condemnation of any material it seeks to bar. Both the administrative and judicial periods during which allegedly obscene material is detained are the shortest compatible with sound resolution of the question of obscenity.

The validity of initial detention of questionable material is plainly proper in light of the broad congressional power to regulate the importation of goods from abroad and the numerous regulatory purposes that

[8] The ordinance had a provision that if the classification board was dissatisfied with the exhibitor's proposed classification of the film, the exhibitor was required to project the film before the board at the "earliest time practicable." Thereafter, the ordinance provided for various brief maximum periods within which particular administrative determinations or court actions had to be made. This Court reversed the lower court's issuance of an injunction against showing of the movie in question on the ground that the standards for censorship were unconstitutionally vague.

detention serves. *E.g., United States* v. *One Carton Positive Motion Picture Film Entitled "491"*, 367 F. 2d 889, 898 (C.A. 2); *United States* v. *392 Copies of a Magazine Entitled "Exclusive"*, 253 F. Supp. 485, 490–491 (D. Md.), affirmed, 373 F. 2d 633 (C.A. 4), reversed on other grounds *sub nom. Central Magazine Sales, Ltd.* v. *United States*, 389 U.S. 50. Serious questions would arise, once materials had been permitted past the customs barrier, whether the government's interest had not become moot.

Section 1305(a) provides that "[u]pon the seizure" of an article thought to be obscene, "the collector shall transmit information thereof to the district attorney of the district * * * who shall institute" forfeiture proceedings in the district court. Customs agents who initially seize material are required to report their action "immediately" to the collector, 19 U.S.C. 1602. The United States Attorney, in turn, must cause the proper proceedings to be commenced and prosecuted, "forthwith * * * without delay," 19 U.S.C. 1604.

The legislative history of 19 U.S.C. 1305(a) indicates that Congress intended the judicial determination of obscenity to be prompt. The original 1930 bill made no reference to judicial proceedings, stating only that obscene material "shall be subject to seizure and forfeiture under the customs laws." 72 Cong. Rec. 5414. Fears of administrative censorship expresed in the Senate debate, *id.* at 5417–5423, 5517–5518, led to a proposed amendment requiring judicial proceedings. *Id.* at 5421. The amendment required the customs collector to refer matter seized as obscene "immediately" to the district attorney. *Ibid.* It was understood that this would lead

to a "prompt determination of the matter by a decision of that court." *Id.* at 5424. The proposal met with general approval. *Id.* at 5421–5424. But because the amendment provided for a jury trial, it was rewritten; the word "immediately" was omitted in this revision. *Id.* at 5423–5424. The section was then passed in its present form. *Id.* at 5520. There is no indication in the debate, however, that the omission was intended to alter the purpose of the amendment to require prompt proceedings, and those courts which have considered the legislative history of the statute have agreed. *E.g., United States* v. *One Carton Positive Motion Picture Film Entitled "491"*, 367 F. 2d 889, 899 (C.A. 2); *United States* v. *One Book Entitled "The Adventures of Father Silas,"* 249 F. Supp. 911, 916–918 (S.D.N.Y.). See, also, *United States* v. *392 Copies of a Magazine Entitled "Exclusive", supra. United States* v. *56 Cartons Containing 19,500 Copies of a Magazine Entitled "Hellenic Sun"*, 373 F. 2d 635 (C.A. 4), reversed on other grounds *sub nom. Potomac News Co.* v. *United States,* 389 U.S. 47; *United States* v. *77 Cartons of Magazines,* 300 F. Supp. 851, 853 (N.D. Cal.).

The several decisions which have upheld the procedures of Section 1305(a) in spite of the absence of legislatively fixed periods have placed stringent limits on the permissible length of administrative and judicial proceedings. In *"Hellenic Sun"* 14 days between entry and institution of proceedings, and another 18 days before filing of the opinion (or 27 days until the formal order was entered) were approved. 373 F. 2d

at 637–638. In *"Exclusive"* periods of 14 days between entry and institution of proceedings, and about six weeks prior to decision were sustained (373 F. 2d at 633–634).[9] Periods of 176 days and 209 days, respectively, were approved in *"491"*, but approval rested on the ground that most of the delay was attributable to the importer. 367 F. 2d at 903–904. In *"Father Silas,"* periods of 98 days and 165 days were disapproved. 249 F. Supp. at 914–915. After this decision the Customs Bureau and the Department of Justice adopted new procedures designed to streamline the administrative determination of obscenity. See the *"Exclusive"* case, 253 F. Supp. at 488–489.[10] These judicial and administrative interpretations of Section 1305(a) provide the

[9] The latter period was found reasonable because of the intervention of this Court's decisions in the *Mishkin*, *Ginzburg*, and *Memoirs* cases which necessitated the filing of additional briefs. 253 F. Supp. at 491.

[10] The present Bureau of Customs Circular (RES–15–RM, July 13, 1966) provides that: (1) the first examination of any material which may include obscene material shall be made "as soon as possible" after it is available for customs examination; (2) if the first examining officer determines that further review of the material is necessary at the district level, the material shall be reviewed by the district director or his delegate "no later than the following business day"; (3) if, at any review, the material is determined not to be obscene, it shall be released; (4) if, at any review, the material is determined to be obscene, an assent to forfeiture shall be solicited "forthwith". If assent is not forthcoming "within one week", or if assent is declined, the material shall be referred to the United States Attorney "immediately"; and (5) if it is felt that the material is probably obscene but there is no clear precedent for the determination, the material shall "immediately" be forwarded for review to the Bureau "by the most expeditious means."

requisite assurance of a prompt determination by a court on the issue of obscenity and, for that matter, sufficiently define a "specified brief period." More rigid time limits would, in fact, seem undesirable. As the court noted in the *"491"* case, "specific time limitations on administrative action * * * would serve only to inject inflexibility into the regulatory scheme authorized under Section 305." [11] 367 F. 2d at 899. See, also, *"Father Silas", supra,* 249 F. Supp. at 923.

The promptness with which forfeiture proceedings took place in this case further confirms that the lack of legislatively fixed times creates no constitutional problem.[12] The photographs were seized on October 24,

[11] A flexible period within which to initiate court action serves several legitimate purposes. For example, it allows careful consideration of material which may present a close question of obscenity so that the Customs Service can properly exercise its duty to select material for judicial consideration with due regard for the interests of both the public and the importer. See *"491," supra,* 367 F. 2d at 902. And, at times when the volume of goods entering the country is at a peak, flexibility will insure that obscene material does not pass through customs simply because government officials missed a deadline by a day or two.

[12] An additional example of the speed with which administrative and judicial action takes place under Section 1305(a) is provided by proceedings regarding the film "Quiet Days in Clichy". The movie was seized at customs in Los Angeles on May 2. A complaint for forfeiture was filed on May 19. Relying on its previous decision in this case, *United States* v. *Thirty-Seven Photographs*, 309 F. Supp. 36, the district court ordered the complaint dismissed on May 20. On May 30, Mr. Justice Black stayed that order, on motion of the United States. The United States pointed out then and thereafter that the claimant had not permitted the obscenity of the film to be determined in the forfeiture proceedings, and that it stood

1969 (App. 24). Within thirteen days, on November 6, 1969, the instant forfeiture action was commenced (*ibid.*). Plainly, as appellee conceded below (App. 26), the government instituted the judicial proceeding rapidly and without delay. Another two months elapsed before the three-judge court hearing of the matter on January 9, 1970. But this delay was not chargeable either to the government officials or to the court procedures under Section 1305(a). Rather it was caused primarily by appellee's invocation of the three-judge court machinery. Although appellee was entitled to seek a three-judge court, his choice should not entitle him to argue that the consequent delay renders the statutory procedures invalid as to him. See the *"491"* case, *supra*, 367 F. 2d at 903–904. Finally, the decision was rendered on January 27. A period of two weeks for consideration of the difficult constitutional questions and writing an opinion is hardly excessive. In sum, the three-month period was completely consistent with prompt, yet responsible, administrative and judicial proceedings on the issue of the obscenity of the material seized.

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ready to proceed on that issue if claimant so desired. On June 29, this Court denied a motion by claimant to vacate the stay, with leave to renew if "a trial on the obscenity *vel non* of this film has not commenced by August 3, 1970, unless any delay of the trial beyond that date has been occasioned by * * * Grove Press." *United States* v. *Ten Reels of a Motion Picture Entitled "Quiet Days in Clichy," Grove Press, Inc., claimant*, 399 U.S. 920. Trial commenced within a week of that order; the film was found not obscene.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the district court should be reversed.

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DECEMBER 1970.

U. S. GOVERNMENT PRINTING OFFICE: 1970

SUBJECT INDEX

III.

TABLE OF AUTHORITIES CITED

Miscellaneous Page

Statutes

Textbooks

IN THE

Supreme Court of the United States

October Term 1970
No. 133

UNITED STATES OF AMERICA,

Appellant,

vs.

THIRTY-SEVEN (37) PHOTOGRAPHS, MILTON LUROS, Claimant,

Appellees.

On Appeal From the United States District Court for the Central District of California.

BRIEF FOR APPELLEES.

Questions Presented.

1. Whether 19 U.S.C. §1305, prohibiting an adult from importing an obscene book or picture for private reading or viewing, is facially unconstitutional because of overbreadth, contrary to the provisions of the First and Fifth Amendments and the ruling in *Stanley*, and whether appellees had standing to challenge the validity of the statute.

2. Whether 19 U.S.C. §1305 is facially unconstitutional, in violation of the First and Fifth Amendments and the ruling in *Freedman* and other related decisions, because of the failure to provide the proce-

dural safeguards essential for the protection of freedom of expression.

3. Whether 19 U.S.C. §1305, on its face and as construed and applied to the importation of obscene materials for distribution solely to willing adults, without dissemination to minors or obtrusively forced upon unwilling recipients, violates the free speech and press, due process, and equal protection provisions of the First and Fifth Amendments, contrary to the rulings in *Redrup*, *Stanley* and *Rowan*.

4. Whether 19 U.S.C. §1305, which purports to vest in Customs officials discretion to seize all media of expression without any prior adversary hearing, violates the free speech and press and due process provisions of the First and Fifth Amendments.

5. Whether the provisions of 19 U.S.C. §1305 violate the free speech and press, due process, and equal protection provisions of the First and Fifth Amendments because the Congressional enactment is without rational basis or empirical support, and provide vague, ambiguous, uncertain and unascertainable standards for judging what books, pictures, or other media of communication may be imported into the United States.

Statement.

On October 24, 1969, Customs agents in Los Angeles, California, seized from the appellee Luros, a citizen of the United States, a book, album, magazine and thirty-seven photographs [A. 15-16]. Appellee Luros was returning to this country following a visit to Europe and the material was seized upon his return. On October 31, 1969, the District Director of the Bureau of Customs advised that the Bureau had referred

the matter to the United States Attorney for the Central District of California for forfeiture action [A. 16]. On November 4, 1969, the attorney for appellees wrote to the District Director of the Bureau of Customs requesting the forthwith delivery of the seized material. On November 5, 1969, the United States Attorney, by his assistant, released to attorney for appellees all the material which had been seized by Customs except the thirty-seven photographs [A. 16]. On November 6, 1969, the Government filed its complaint seeking judicial approval to enforce the forfeiture of the photographs [A. 2-3]. On November 14, 1969, appellees filed their answer and counterclaim [A. 3-9, 16]

Pursuant to the prayer of the appellees contained in their counterclaim, a three-judge district court (Ferguson, Barnes, Curtis, JJ.) was convened pursuant to 28 U.S.C. §§2282 and 2284 to determine whether the Government should be enjoined from enforcing 19 U.S.C. §1305 [A. 9-13]. On January 27, 1970, the three-judge court rendered an opinion [A. 24-27], holding that 19 U.S.C. §1305, in the light of the rulings by this Court in *Stanley v. Georgia,* 394 U.S. 557 and *Freedman v. Maryland,* 380 U.S. 51, on its face and as construed and applied violates the rights guaranteed to appellees under the free speech and press and due process provisions of the First and Fifth Amendments.

The court held that 19 U.S.C. §1305 clearly violates the freedom of speech and press provisions of the First Amendment. The statute, contrary to *Stanley,* "prohibits an adult from importing an obscene book or picture for private reading or viewing, an activity which is constitutionally protected" [A. 25]. The court also held that claimant had standing to attack the

validity of the statute because of its broad sweep, despite the admission of claimant that it was his intention to incorporate the pictures in a book for distribution [A. 25]. The court also held that the statute failed to provide the procedural safeguards required under the First and Fifth Amendments and the ruling of the court in *Freedman v. Maryland*. "Section 1305 is a system of censorship by customs agents which is barren of safeguards" [A. 26].

There were additional objections made to the validity of the statute by claimant which were not reached by the court. The claimant urged that the statute was invalid because it purported to forbid the importation of explicit sexual materials for distribution to willing adults, the distribution to be made in such a manner as not to intrude upon the sensitivities or privacy of the general public or for dissemination to minors. "Without rejecting this argument, we decide the case based upon the narrowest construction of *Stanley*" [A. 25]. The court also declined to consider as unnecessary the attack on the constitutionality of §1305 because of the failure to provide for an adversary hearing prior to seizure by Customs officials, and because of the vagueness of the law [A. 26].

Accordingly, and in accordance with the findings of the district court, a judgment was entered [A. 27-28], restraining and enjoining the Government from enforcing the provisions of 19 U.S.C. §1305 against appellees; directing the return of the photographs; and declaring that the statute on its face and as construed and applied violates the constitutional rights of appellees. This appeal followed [A. 29].

Summary of Argument.

I.

The appellant initially bases its argument on the broad "commerce" powers of Congress and the allegedly limited scope of *Stanley*.

It does not meet the issue to stress the powers of Congress delineated in the Constitution. It has been constantly reiterated by the Court that broad as the commerce, postal or tax powers of Congress may be, they are circumscribed by the requirements of the First Amendment. The federal government does not have the power to prevent the importation of books or other media of expression which are not obscene, and the existence of a power to prevent the importation of obscene matter does not mean that there can be no constitutional barrier to any form of practical exercise of that power.

A. Although the case below was decided "upon the narrowest construction of *Stanley*", appellant has chosen to discuss the scope of *Stanley* in broader terms, relying principally on the arguments advanced in the government's brief *amicus curiae* in *Byrne v. Karalexis*. The gist of appellant's argument is that *Stanley* means no more than the private right of an individual to possess obscene matter in his home.

The brief for appellee in *Reidel*, the companion case herein, details the answers to the government's arguments in *Byrne*. In substance, appellees contend that even before the ruling in *Stanley*, the Court had already indicated that obscenity could not be deemed outside the protection of the guarantees of the First Amendment in all contexts. In decisions subsequent to *Roth* and culminating in *Redrup*, the Court summa-

rized the only interests of the State which might be sufficiently compelling to authorize a limitation on the distribution of obscene utterances, to wit: a specific and limited state concern for juveniles; the prevention of assaults upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it; and "pandering" of the sort the Court found significant in *Ginzburg*.

The right to receive information and ideas, regardless of their social value, was the fundamental right which the Court sought to protect in *Stanley*, although that basic right took on an "added dimension" in the context of the case. In *Stanley*, the Court could find no countervailing state interest justifying restriction of this fundamental right. The label of "obscenity" was insufficient; the right to control the moral content of a person's thoughts was unacceptable; the assertion by the State that exposure to obscene materials may lead to antisocial or criminal behavior was rejected. The only evils which the State might have a right to prevent, the distribution of obscene materials to minors or obtrusive forcing upon unwilling recipients, were not present in the context of private consumption of ideas and information.

The government conceded in *Reidel* and *Rowan* that a constitutional right to receive information and ideas includes a corresponding right of dissemination. Many legal commentators and a considerable number of lower courts have construed *Stanley* as protecting the right to receive and the right to distribute obscene materials to adults for their private consumption. Congress itself, under the Postal Reorganization Act, has drawn the line, under the Constitution, between will-

ing adults and those upon whom material is obtrusively forced. The rulings in *Redrup*, *Stanley* and *Rowan* in similar fashion recognize the same constitutional distinction.

B. On the issue decided by the court below, appellant urges that *Stanley* does not extend to importation "even for avowedly personal use". It is urged that no citizen has a "right to be let alone" by Customs. The question here, however, is not whether Customs has the right to inspection, but whether Customs has a right to confiscate books and papers intended solely for private use by an adult. There does not appear to be any compelling state interest which can justify prohibition of an adult citizen's acquisition of materials abroad to be brought back to this country for his own private use. While appellant concedes that dissemination which is "consensual, adult and private in nature" should not as a matter of policy be infringed by postal or customs agencies, appellant nevertheless urges that importation for private use should not receive constitutional protection because of difficulties in the administration of the Customs process. *Stanley* held that such a contention was untenable, presenting neither a compelling nor necessary legitimate state interest justifying an abridgment of a fundamental liberty.

II.

Appellant apparently concedes that if importation for viewing is an activity which is constitutionally protected, then 19 U.S.C. §1305 is overbroad and facially invalid under the First Amendment. It is settled that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.

Appellant also recognizes that the overwhelming weight of authority supports appellees' standing to challenge the constitutional validity of the statute. The argument of appellant that one has standing to challenge statutes only when the laws are both vague and overbroad has no decisional support. The argument that appellee's conduct is "hard-core" is clearly untenable. The record is clear that the photographs were to be incorporated into a book, *The Kama Sutra,* already distributed widely throughout the nation. The material was intended only for willing adults and was not being imported for distribution to minors or to be thrust upon unwilling viewers. Indeed, the statute, as contended by appellees, is additionally overbroad because it infringes upon the right to import explicit sexual materials for dissemination solely to willing adults, an issue not reached by the court below.

In the ultimate sense, appellant's argument comes down to a request for this Court to engage in rewriting and "restrictive interpretation". The line, however, in the First Amendment area, between "commercial" and "noncommercial" materials is extremely elusive. First Amendment rights are not lost because dissemination takes place under commercial auspices. Moreover, Congress, and many lower court decisions, have recognized that commercial dissemination of explicit sexual materials to willing adults for private consumption is entitled to constitutional protection. Importation, even for personal use, can take place in a variety of circumstances and include a variety of persons with whom a citizen might have various social and private relationships. The task of writing legislation today in the obscenity area, within bounds fixed by decisions of the Court and the Constitution, is committed to Congress.

III.

The provisions of 19 U.S.C. §1305 clearly fail to meet the constitutional standards and criteria enunciated in *Freedman* to obviate the dangers of a censorship system. The statute is clearly barren of any safeguards. The court decisions do not support appellant's position. Indeed, the cases establish that the Customs procedures under the law are necessarily lengthy, time-comsuming, and subject to the arbitrary and capricious decisions of officials throughout the service. The Bureau's own regulations, as epitomized in the Bureau of Customs circular, indicate that there is no time limit placed on ultimate administrative decision as to whether material is or is not "probably obscene". The discretion vested in the administrative officials, without time limits fixed by statute or by judicial rule, violates the First Amendment.

Appellees have additional contentions, not reached by the court below, with respect to the constitutional invalidity of 19 U.S.C. §1305. The statute is unconstitutional because it purports to forbid the importation of obscene material for distribution solely to willing adults. The statute also purports to vest in Customs officials discretion to seize books and other media of expression without a prior adversary hearing. Finally, appellees contend that there is no rational or other factual basis for adult censorship imposed by 19 U.S.C. §1305, and that the statute therefore abridges the exercise of freedoms of speech and press, arbitrarily deprives persons of their liberty and property without due process of law, and discriminatorily denies persons the equal protection of the laws, contrary to the provisions of the First and Fifth Amendments.

ARGUMENT.

I.

The District Court Correctly Concluded That United States Code, Title 19, Section 1305, Which Prohibits an Adult From Importing an Obscene Book or Picture for Private Reading or Viewing, Is Facially Unconstitutional Because Overbroad, in Violation of the First and Fifth Amendments and the Rulings of the Court in Redrup, Stanley and Rowan. The Power of Congress to Regulate Commerce Is Circumscribed by the Requirements of the First Amendment, Both With Respect to Importation of Obscene Materials for Personal Use or for Distribution Solely to Willing Adults.

The appellant initially hinges its argument on the power of Congress to regulate "commerce" under Article I, Section 8 (Appellant's Br. 9-10). The commerce powers of Congress, like the postal and tax powers, are, of course, delineated in the Constitution, but they have been held to be circumscribed by the First Amendment. *Red Lion Broadcasting Co., Inc. v. FCC,* 395 U.S. 367, 389-390; *Lamont v. Postmaster General,* 381 U.S. 301, 306; *Murdock v. Pennsylvania,* 319 U.S. 105, 112-117. "It has been said that Congress may not by withdrawal of mailing privileges place limitations upon the freedom of speech which if directly attempted would be unconstitutional." *Speiser v. Randall,* 357 U.S. 513, 518.[1]

[1]Appellant states that Congress has prohibited importation "of various types of obscene material" into this country since 1842 (Appellant's Br. 10). The Tariff Act of 1842, insofar as "obscenity" is concerned, has had a checkered career. See, Paul and Schwartz, Federal Censorship: Obscenity in the Mail (1961), 12-17, 23-24, 39-43, 46-49, 55-62, 64-67, 68-69, 87-91, 117-125, 126-130, 160-162, 169-172. It emerged in the Nineteenth Century when, with the prodding of Anthony Comstock and the

It does not meet the issue here to argue that obscene material is "merchandise", without protection of the First Amendment and "fully subject to the government's power to exclude". (Appellant's Br. 10). It is plain, for example, from at least the decision of Judge Woolsey in *Ulysses* to the decisions of the Court in *Central Magazine Sales* and *Potomac News Co.*, that the holding in *Roth* does not recognize any power in the federal government to prevent the importation of books or other media of expression which are not obscene. Moreover, the existence of a power to prevent the importation of obscene matter "does not mean that there can be no constitutional barrier to any form of practical exercise of that power". *Smith v. California*, 361 U.S. 147, 152, 155.

The specific holding of the court below was that Title 19 U.S.C. §1305 is facially unconstitutional be-

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Hicklin rule, the focus of law shifted from the personal behavior of an accused to the ideas or the content of his expression. Customs generally promulgated its own rulings with respect to what expression was unfit for importation and the practice, still existing, of writing a letter to the person importing the material, advising him that the Customs Bureau considers the materials to be "obscene" and requesting assent to administrative forfeiture of the materials, resulted generally in cutting down litigation and enlarging the powers of the Customs censorship. Thus, at one time or another, in the past Balzac's *Droll Stories*, *The Decameron*, *The Golden Ass* of Apuleius, Flaubert's *Temptation of St. Anthony*, George Moore's *Story Teller's Holiday*, *Lady Chatterley's Lover*, Anatole France's *The Gods are Athirst*, *The Well of Loneliness* and *Ulysses* were denied clearance. The later discretion vested in the Secretary of the Treasury to admit "classics" did not aid Henry Miller's *Tropic of Cancer* or *Tropic of Capricorn*. See, *Besig v. United States*, 208 F. 2d 142 (9 Cir. 1953). *Cf.*, *United States v. One Book Entitled "Ulysses"*, 72 F. 2d 705 (2 Cir. 1934), affirming 5 F. Supp. 182 (D.C. N.Y. 1933), opinion by Woolsey, J. See also, *Central Magazine Sales v. United States*, 389 U.S. 50, reversing, based on *Redrup*, a judgment of forfeiture of imported magazines, 373 F. 2d 633 (4 Cir. 1967); *Potomac News Co. v. United States*, 389 U.S. 47, reversing 373 F. 2d 635 (4 Cir. 1967); *Grove Press v. Gerstein*, 378 U.S. 577.

cause of its overbreadth. The statute prohibits an adult from importing an obscene book or picture for private reading or viewing, an activity which under *Stanley v. Georgia*, 394 U.S. 557 is constitutionally protected. The right to read necessarily protects the right to receive. The statute here prohibits a person who may constitutionally view pictures of the right to receive them [A. 25].[2]

A. Although the case herein was decided below "upon the narrowest construction of *Stanley*" [A. 25], the appellant has chosen initially to discuss the scope of *Stanley* in broader terms (Appellant's Br. 10-14). The appellant calls attention to the government's brief *amicus curiae* in *Byrne v. Karalexis* to support its thesis that "the opinion's focus [was] on the privacy of the individual whose possession of obscene matter was there made a crime" (*Ibid.* 10-14). The brief for appellee in the companion case herein, *United States v. Reidel*, No. 534, develops fully the answers to the arguments of the government in its *amicus* brief in *Byrne*. Only the substance of appellee's arguments is, therefore, set forth here.

The fundamental premise of *Roth* was that obscenity was outside the area of constitutional protection because "utterly without redeeming social importance". Relying upon *Beauharnais*, 343 U.S. 250 and *Chaplinsky*, 315 U.S. 568, the Court rejected all claims that the prevention and punishment of obscene utterances raised any constitutional problems. The Court emphasized, however, that the standards for judging

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[2]The district court relied on *Stanley* and *Lamont*. It is not without significance that the briefs of appellant in both *Reidel* and the case herein omit any mention of the *Lamont* and *Rowan* decisions.

obscenity must safeguard the protection of freedom of speech and press for material which was not obscene as defined by the Court. In succeeding decisions, the Court stressed that the holding in *Roth* did not recognize any state power to restrict the dissemination of books which were not obscene; the power to regulate obscene matter was limited by the requirements of the First Amendment.

The vagueness and ambiguity of the standards for judging obscenity, and the difficulty of applying such standards in particular cases, led to the suggestion in *Jacobellis v. Ohio,* 378 U.S. 184 that laws aimed at preventing distribution of objectionable material to children would better serve the state interest than the total prohibition of dissemination of alleged obscene material. In *Ginzburg v, United States,* 383 U.S. 463, the Court suggested a second state interest which might justify a limitation on the dissemination of explicit sexual materials If the conduct of the publisher was such as to obtrusively proclaim the obscenity of the material, then such obtrusive conduct might be prohibited. In *Redrup v. New York,* 386 U.S. 767, after reversing the judgments in all three cases, the Court summarized the interests of the State which might be sufficiently compelling to authorize a limitation on the distribution of obscene utterances: A specific and limited state concern for juveniles; prevention of assaults upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it; "pandering" of the sort which the Court found significant in *Ginzburg.*

Thus, even before the ruling in *Stanley,* the Court had already indicated that obscenity could not be deemed outside the protection of the guarantees of the

First Amendment in all contexts. The impact of *Beauharnais* had also been considerably lessened by the ruling in *New York Times Co. v. Sullivan*, 376 U.S. 254, and *Chaplinsky* had come to be limited by subsequent rulings of the Court to only those provocative words likely to cause "a breach of the peace".

The right to receive information and ideas, regardless of their social value, was the fundamental right which the Court sought to protect in *Stanley*, although that basic right took on an "added dimension" in the context of the case. The assertion of a governmental interest in dealing with the problem of obscenity could not in every context, the Court stated, be insulated from all constitutional protections. "Neither *Roth* nor any other decision of this Court reaches that far". 394 U.S. at 563. "This right to receive information and ideas, regardless of their social worth, * * * is fundamental to our free society." 394 U.S. at 564.

In *Stanley* the Court could find no countervailing state interest justifying restriction of the aforesaid fundamental rights. The mere categorization of the material as "obscene" was insufficient; the claim that the State had the right to control the moral content of a person's thoughts was inconsistent with the philosophy of the First Amendment; the assertion by the State that exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence was rejected because "among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law." The only evils which the State might have a right to prevent, the distribution of obscene material to minors or the distribution in such a manner as to invade the privacy or sensibilities of the general public, were not present

in the context of private consumption of ideas and information. 394 U.S. at 565-567.

The government insists in its brief *amicus curiae* in *Byrne v. Karalexis* that *Stanley* recognized no constitutional "right to receive" obscene materials; that, in effect, the dissemination of explicit sexual materials to a willing adult like Stanley for his private consumption was without First Amendment protection. In reaching this conclusion, the appellant appears to ignore the statement repeated three times in the *Stanley* opinion that the basic constitutional right involved was the "right to receive information and ideas, regardless of their social worth". The *Stanley* opinion pointed to the decisions in *Martin v. City of Struthers, Griswold* and *Lamont* as cases which stress that freedoms of speech and press embrace the right to distribute all media of communication and necessarily protect the right to receive it. The right to receive information is included in the scope of the First Amendment protection because the receipt of information furthers the basic policies embodied in the Amendment. Dissemination is protected because the recipient is entitled to information about all issues, to enable him to cope with the exigencies of his time.

In *Reidel,* the government conceded that if a constitutional right to receive obscene material is recognized in *Stanley,* then clearly there is bound to be a corresponding right of dissemination. In *Rowan,* the government in fact cited *Stanley* in its brief to support the proposition that freedoms of speech and press "embrace the rights necessary to effectuate those freedoms, including the right to circulate and receive publications, the right to listen and the right to read". (Respondent's Br. p. 31). Virtually all legal commentators have stressed

the significance of *Stanley* as protecting the right to distribute and the right to receive obscene materials by adults for private consumption. Many courts throughout the Nation have construed *Stanley* as based upon a constitutional right to receive obscene material for private use. It has been constantly reiterated that if the government has no substantial interest in preventing a citizen from reading books and watching films in the privacy of his home, then clearly it can have no greater interest in preventing or prohibiting him from acquiring them. The courts have stated that it would be illogical under the First Amendment to make legal the possession of materials which could only be purchased illegally.

As heretofore stated, the foregoing arguments were detailed in appellee's brief in *Reidel.* It was additionally noted in that brief that even in the area of conduct, as distinguished from expression, there have been changing concepts by both legislatures and courts with respect to sexual practices not involving force, adult corruption of minors, or public affront. Moreover, the Report of the Commission on Obscenity and Pornography, which was submitted in September of 1970, not only supports the conclusions in *Stanley,* but emphasizes that the premises upon which adult censorship rested in the past have no basis in fact. And finally, Congress has made provisions to protect those legitimate interests which the federal government may have under the Constitution to regulate obscenity. Under the Postal Reorganization Act, unwilling adults on behalf of themselves and their children may prevent the sending of unsolicited mail, and civil and criminal sanctions are contained in the laws against those who disseminate obstrusively to unwilling recipients. The adult citizen remains free under Congressional legislation to receive

whatever material he desires, without consequences to the recipient or to the distributor. The rulings in *Redrup*, *Stanley* and *Rowan* are judicial counterparts of the legislative determination that the line must be drawn, under the Constitution, between willing adults and those upon whom material is obtrusively forced.

While appellant states here that it intends to expand upon "our analysis in *Byrne*" (Appellant's Br. 11), its discussion proves to be no more than a reiteration of the position advanced in *Byrne*. It is urged that *Stanley* was only intended to protect the privacy of the accused in that case, and not intended to protect any right to receive obscenity for his private consumption.

Stanley makes clear that even though material may be described as "obscene", such label does not derogate from the individual's right to receive it. *Stanley* asserts the fundamental principle that the right of an adult to the private consumption of ideas and information includes the right to acquire such ideas and information. It is an empty right which an adult enjoys to read a book or view a film in his home without the opportunity to acquire such book or film lawfully. If *Martin v. Struthers*, 319 U.S. 141 and *Lamont*, as well as *Stanley*, state any fundamental position, it is that to willing adults the distribution and the receipt of explicit sexual materials are vital to the preservation of the First Amendment freedoms guaranteed to "Mr. Stanley".

If an adult has a right under the First Amendment to the private possession of obscene materials, as concededly *Stanley* holds, then appellant has presented no compelling and legitimate federal interest which would justify limiting his right to receive such material. Where material is being distributed to a willing adult, and is

not designed or intended for minors, or obtrusively forced upon unwilling recipients, there is no substantial governmental interest which would justify shutting off all avenues for the willing adult to obtain the material the Constitution states he has a right to possess.

B. Departing from its broad discussion of *Stanley*, appellant now turns to the argument that "the *Stanley* rationale does not extend to importation even for avowedly personal use" (Appellant's Br. 15).[3] It is urged that no citizen has a "right to be let alone" by Customs; that for more than one hundred years Customs has traditionally examined an individual's luggage, and cases are cited involving attempts to smuggle heroin, intoxicating liquors, stolen goods, or goods liable for duties across the borders (Appellant's Br. 15). It is then concluded that "books and papers may be examined if for no other reason than to see what may be concealed between their leaves" (Appellant's Br. 15).

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[3]The appellant states that the "question need not be reached in this case" (Appellant's Br. n.3). The precise ruling of the district court is that the statute was too broad because it prohibited an adult from importing an obscene book or picture for private reading or viewing. Plainly, the question is one which is reached in this case. In the decision of the district court in *United States v. Articles of "Obscene" Merchandise*, 315 F. Supp. 191 (D.C. N.Y. 1970), appeal dismissed (Oct. Term 1970, No. 778, Dec. 7, 1970) it was held that 19 U.S.C. §1305, as applied to importation of obscene materials by a citizen concededly for his own private use, was unconstitutional. The court concluded that a statute which by its terms prohibits importation by an individual of obscene material for his own private use and enjoyment in his own home offends the First Amendment. The district court declined to meet as unnecessary in that case, the issue of overbreadth. The court did suggest that obscene material, in certain situations, can now apparently invoke constitutional protection under *Stanley*, and for that reason 19 U.S.C. §1305 may be unconstitutional, even as it applies to importation for commercial distribution, in the absence of a government showing that one of the legitimate state interests summarized in *Redrup* will be infringed by commercial distribution subsequent to importation.

Clearly, this ignores the real issue presented here. Even if books and papers may be inspected by Customs, it does not follow that books and papers may be confiscated and denied to citizens for private use if nothing is found between the leaves. Nor does it meet the issue to state that Customs procedures are procedures *in rem*; that no crime is charged; and that Congressional power to exclude is complete, "save as it may be protected by the Constitution" (Appellant's Br. 15-16).

If an adult citizen has the right to read or view obscene materials for his private use under the Constitution, what compelling state interest can appellant offer to justify prohibition of his acquiring such material abroad and bringing it back with him to this country for his own private use? It does not advance appellant's argument to assert that the material is "obscene". However "obscene" a book may be, that book in the possession of an adult citizen for his own private use is entitled to constitutional protection, not only under *Stanley* but under the free speech and press guarantees of the First Amendment to the Constitution of the United States.

Finally, the appellant argues that "public morality" may be threatened even by importations avowedly for personal use. It appears that if material is found by accident hidden in a desk in a private home, "one may have considerable confidence that it is meant only for private use" (Appellant's Br. 16). No such confidence, it is alleged, is possible when the material is at the "country's borders". It is argued that there is a "danger of false statements" and that there are limitations on information available to the Customs officials "regarding actual intended use".

In short, the individual's right to read or observe what he pleases, a right "so fundamental to our scheme of individual liberty", is to be restricted because of alleged need to ease the administration of the Customs process. *Cf., Stanley v. Georgia,* 394 U.S. at 567-568. This, it is submitted, is neither a compelling nor necessary legitimate state interest justifying an abridgment of a fundamental liberty.[4]

It should be noted that 19 U.S.C. §1305 permits the importation of obscene "classics" for personal use. It is also to be noted that in *United States v. 31 Photographs,* 156 F. Supp. 350 (D.C. N.Y. 1957), it was held that despite the provisions of 19 U.S.C. §1305 obscene material could be imported by "qualified scholars engaged in bona fide research". The Government took no appeal from the judgment. A learned commentator has stated:

> "It should be added that not only is the prohibition of erotic materials, voluntarily sought by adults, incompatible with a system of freedom of expression, but such censorship is futile and discriminatory as well. Our society is crammed full of sexually stimulating reading matter, sights and events. It is literally impossible for the government to suppress all stimuli that may arouse sexual excitement, any more than it can eliminate sex. Nor can it suppress even the most erotic without

[4]In *Stanley,* the Court observed that among free men, "the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law" (394 U.S. at 566-567). See, 19 U.S.C. §§1509, 1510. See also, 18 U.S.C. §1001. The appellant concedes that dissemination which is "consensual, adult and private in nature" should not as a matter of policy be infringed by postal or Customs agencies, but argues that this is not a "constitutional requirement". (Appellant's Br. 17, fn. 4).

> eliminating much of the world's literature and art. The consequence is, as already noted, that the impact of obscenity laws falls primarily, or would if the laws could be enforced, upon particular groups in our society who happen not to prefer or be able to afford elite pornography." Emerson, *The System of Freedom of Expression*, 499-500 (1970).

We do not deal here with "solicitors for gadgets or brushes" (Appellant's Br. 20, fn. 6). We deal here with expression ordinarily protected by the provisions of the First Amendment. The fact that material intended for one use may be used for other purposes once "past the customs barrier" (Appellant's Br. 16) is not a reason for resorting to customs censorship and suppression of expression imported for private consumption or for distribution to willing adults entitled to freedom from governmental interference under the First Amendment and *Stanley*. On the other hand, if such material is designed or intended for minors or obtrusively forced upon unwilling recipients, then the federal and state governments have adequate recourse.[5] The administration of the customs statute by customs officers cannot be, it is submitted, a compelling state interest justifying the suppression of activities protected by the provisions of the First Amendment.

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[5]"The statutes of forty-one jurisdictions contain some type of special prohibition regarding distribution of erotic material to young persons. Eighteen of these statutes are either identical to or closely patterned after the New York statute upheld in *Ginsberg v. New York*." The Report of the Commission on Obscenity and Pornography, September 1970 (U.S. Government Printing Office, 330). See also in the same report: "Existing federal and state obscenity prohibitions—their content and enforcement," 328-339.

II.

Appellees Clearly Have Standing to Challenge United States Code, Title 19, Section 1305 as Overbroad and Therefore Unconstitutional, Where the Statute Reaches All Obscene Works and Sweeps Within Its Ambit Activity Which Is Constitutionally Protected Under the First and Fifth Amendments and the Rulings of the Court in Redrup, Stanley and Rowan.

The appellant apparently agrees that if the importation of an obscene book or picture for private reading or viewing is an activity which is constitutionally protected, then 19 U.S.C. §1305 is an overbroad statute and facially invalid under the First Amendment. Indeed, the entire burden of appellant's argument is that 19 U.S.C. §1305 reaches all obscene works. Appellant's somewhat tentative contention is that appellees lack "standing" to challenge the overbroad law.[6]

The rationale for the condemnation of overbroad statutes in the First Amendment area has been stated on numerous occasions by this Court and lower courts. The stress by the judiciary has been upon an overriding duty to protect all persons from the chilling effect upon the exercise of First Amendment freedoms generated by such overbroad statutes. The reason for invalidating an overbroad statute is to terminate its

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[6]The appellant complains that the court below ignored the "separability" clause in the Customs statute, 19 U.S.C. §1652. Overbreadth is constitutionally fatal because the legislature has enacted a statute susceptible to sweeping and improper application, and overbroad statutes have been stricken by the courts in their entirety because violative of the First Amendment, wholly apart from the particular motives or intentions of the legislature. See, Note, Inseparability in Application of Statutes Impairing Civil Liberties, 61 Harv.L.Rev. 1208, 1213 (1948). See also, *Smith v. California*, 361 U.S. 147, 151.

deterrence of constitutionally protected activity. An overbroad statute by its very presence tends to create a self-censorship, a reluctance by individuals to exercise fundamental rights which in the last analysis may deprive the community of access to ideas and information essential to cope with the problems of society. Since the issue is one of deterrence of protected activities, the courts have not distinguished between overbroad penal or civil statutes.

Thus, it has been stated: "Appellant's challenge is not that the statute is void for 'vagueness', that is, that it is a statute 'which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . .' Rather, his constitutional attack is that the statute, although lacking neither clarity or precision is void for 'overbreadth', that is, that it offends the constitutional principle that 'a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms'." *Zwickler v. Koota,* 389 U.S. 241, 249-250. "It is a familiar and basic principle, . . . that 'a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms'." *Aptheker v. Secretary of State,* 378 U.S. 500, 508. "It has become axiomatic that 'precision of regulation must be the touchstone in an area so closely touching our most precious freedoms'. Thus, §5(a)(1)(D) contains the fatal defect of overbreadth because it seeks to bar employment both for association which may be proscribed and for asso-

ciation which may not be proscribed consistently with First Amendment rights . . . This the Constitution will not tolerate." *United States v. Robel,* 389 U.S. 258, 265-266. "Broad prophylactic rules in the area of free expression are suspect." *NAACP v. Button,* 371 U.S. 415, 438. "It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion." *Thornhill v. Alabama,* 310 U.S. 88, 97.

See also, *Smith v. California,* 361 U.S. 147, 151-152; *Cantwell v. Connecticut,* 310 U.S. 296, 304-307; *Dombrowski v. Pfister,* 380 U.S. 479, 486-487; *Freedman v. Maryland,* 380 U.S. 51, 56; *Keyishian v. Board of Regents,* 385 U.S. 589, 609; *Baggett v. Bullitt,* 377 U.S. 360, 372-373; *Martin v. City of Struthers,* 319 U.S. 141, 143-144; *Kunz v. New York,* 340 U.S. 290, 293-294; Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 852-858 (1970); Note, The Chilling Effect in Constitutional Law, 69 Colum. L. Rev. 809, 813 (1969).

The appellant's argument that appellees lack standing to challenge the constitutional validity of the statute is cast in very limited terms. The appellant concedes that "when First Amendment freedoms" are involved, the Court has " 'allowed attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specifity' " (Appellant's Br. 18-19). It is conceded that the reason for the rule is the possible " 'chilling effect' " of such statutes on the exercise of First Amendment rights (*Ibid.* 19). It is also conceded by appellant that appellee has standing to challenge the procedures of §1305 because, according to appellant, the sweep-

ing nature of the procedures of some statutes may substantially inhibit the rights of those who may be entitled to First Amendment protection (*Ibid.* 19, fn. 5). In making all of these concessions, appellant is doing no more than recognizing the overwhelming weight of authority which supports appellees' standing to challenge the statute herein for overbreadth. *Thornhill v. Alabama,* 310 U.S. 88, 97-98; *NAACP v. Button,* 371 U.S. 415, 432-433; *Dombrowski v. Pfister,* 380 U.S. 479, 486-487; *Freedman v. Maryland,* 380 U.S. 51, 56; Note, *supra,* 83 Harv. L. Rev. at 857, n. 55.

The argument of appellant comes down to the mere contention that one has standing only to challenge statutes which are both "vague" and "overbroad". According to the government, it is only the vagueness which causes the "chilling effect" in overbreadth (Appellant's Br. 19-20). There is no merit to this attempted distinction, it is submitted. Overbreadth is constitutionally fatal because the very presence of the statute and the clarity of its terms deter citizens from the exercise of protected freedoms and because such a statute, which concededly covers privileged conduct, readily lends itself to harsh and discriminatory enforcement by officials. Of course overbroad statutes, especially in the obscenity area, have elements of vagueness in them because citizens do not know where the statute draws the line between privileged and nonprivileged conduct. There is, no doubt, therefore, that a statute like 19 U.S.C. §1305, which by its language covers all obscene material, is overbroad and may be challenged by appellees, wholly apart from the context of the particular record here. The appellant has simply chosen to disregard the decision of the Court in *Zwickler v. Koota,* 389 U.S. 241, where the Court emphasized standing of

a suitor in a federal court to challenge an "overbroad" statute as distinguished from a suitor challenging a "vague" statute. 389 U.S. at 249-250. See also, *Hiett v. United States,* 415 F. 2d 664, 670-673 (5 Cir. 1969), cert. denied 397 U.S. 936.

In final analysis, appellant's argument on "standing" is reduced to arguing that appellee's "activity is the 'sort of "hardcore" conduct that would obviously be prohibited under any construction' " of the statute (Appellant's Br. 20), and that in any event the overbreadth of the law can be cured "by a restrictive interpretation which will avoid constitutional doubt or by excising invalid portions of the statute" (Appellant's Br. 21).

There is not the slightest evidence in the record of any "hardcore" conduct on the part of appellee. The stipulation in the record is merely that the photographs seized were intended to be incorporated in a hard cover edition of *The Kama Sutra of Vatsyayana,* a book which had been distributed widely throughout the nation and acclaimed as a work of substantial value. At least some of the photographs were intended for inclusion in the book [A. 16]. Counsel for appellees, in his letter to the District Director of the Bureau of Customs, specifically stated that "the material is not being imported for distribution to minors, nor to be thrust upon unwilling viewers" [A. 19]. It is appellee's contention that the activity in which he proposed to engage was not only constitutionally protected, but that the statute was additionally overbroad because it in-

fringed upon the right to import explicit sexual materials for dissemination to willing adults. This issue, as heretofore stated, was not reached by the court below, and the arguments in support of this contention are set forth in detail in *Reidel,* the companion case herein. In any event, on the issue of standing there can be no dispute, it is submitted, that appellees had the standing under the decided cases to challenge the constitutional validity of the law.

The final request of the appellant is that this Court should consider a cure for overbreadth by "a restrictive interpretation". This, of course, would require a wholesale rewriting by the Court and a disregard of legislative intent. The appellant attempts to draw a line between "commercial" and "noncommercial". The difficulty is that we are in the First Amendment area where lines between protected and unprotected speech, commercial and noncommercial materials, are extremely elusive. In the first place, it is "no matter that the dissemination takes place under commercial auspices". *Smith v. California,* 361 U.S. 147, 150. In the second place, both the laws of the United States, 39 U.S.C. §§3008 and 3010, and numerous court decisions have recognized that commercial dissemination of explicit sexual materials to willing adults for private consumption is constitutionally protected. See, Brief for Appellee in *United States v. Reidel.* In the third place, importation for personal use can include a wide variety of circumstances, involving various places and persons with whom a citizen might have social and private relationships. As

this Court stated in *Aptheker v. Secretary of State*, 378 U.S. 500, 515-516:

> "The clarity and preciseness of the provision in question make it impossible to narrow its indiscriminately cast and overly broad scope without substantial rewriting. The situation here is different from that in cases such as United States v. National Dairy Products Corp., 372 U.S. 29, 83 S.Ct. 594, 9 L.Ed.2d 561, where the Court is called upon to consider the content of allegedly vague statutory language. Here, in contrast, an attempt to 'construe' the statute and to probe its recesses for some core of constitutionality would inject an element of vagueness into the statute's scope and application; the plain words would thus become uncertain in meaning only if courts proceeded on a case-by-case basis to separate out constitutional from unconstitutional areas of coverage. This course would not be proper, or desirable, in dealing with a section which so severely curtails personal liberty."

See also, *United States v. Robel*, 389 U.S. 258, 267-268: "We are concerned solely with determining whether the statute before us has exceeded the bounds imposed by the Constitution when First Amendment rights are at stake. The task of writing legislation which will stay within those bounds has been committed to Congress."

III.

The Customs Statute, United States Code Title 19, Section 1305, Creates a Censorship System Without the Procedural Safeguards Required by the Provisions of the First and Fifth Amendments and the Ruling of the Court in Freedman. Although the Issues Were Not Reached by the District Court, the Statute Is Unconstitutional Because of Additional Overbreadth, Failure to Provide for an Adversary Hearing Prior to Seizure by Customs Officials, and Because No Rational or Reasonable Basis Exists for the Congressional Enactment, All Contrary to the Free Speech and Press, Due Process, and Equal Protection Provisions of the Constitution.

A. This Court has stated that any system of prior restraints of expression "Comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan,* 372 U.S. at 70. There must be procedural safeguards designed to obviate "the dangers of a censorship system." *Freedman v. Maryland,* 380 U.S. 51, 58. Thus the burden of proving that material is unprotected expression rests on the censor; the censor must "within a specified brief period" either hold his hand or go to Court; any restraint imposed in advance of a final judicial determination must be limited to "the shortest fixed period" compatible with sound judicial resolution; and the procedure must also "assure a prompt final judicial decision." These procedural safeguards must be contained in the statute or by judicial rule. *Freedman v. Maryland,* 380 U.S. at 58-59.

The provisions of 19 U.S.C. §1305, plainly fail to meet the constitutional standards and criteria enunciated by the Court in *Freedman.* Appellant does not

make any contention to the contrary. Appellant relies upon an Administrative Circular which it contends provides "streamline" proceedings adequate to meet constitutional requirements (Appellant's Br. 26, fn. 10). In addition, it is urged that various district courts have resorted on a case-to-case basis of either approving or disapproving the length of administrative and judicial proceedings, all of which it is contended "provide the requisite assurance of a prompt determination on the issue of obscenity and, for that matter, sufficiently define 'specified brief period.' " (Appellant's Br. 26-27).

Nothing, however, referred to by appellant in its brief justifies its contention that "the procedural system in this case affords the safeguards which *Freedman* and its progeny require." (Appellant's Br. 23). In *Freedman,* the statutory procedures were held invalid. In *Teitel Film Corp. v. Cusack,* 390 U.S. 139 (Appellant's Br. 23), a period of 50 to 57 days was held excessive (Appellant's Br. 23). The time consumed in *Exclusive* between entry and final decree was 60 days. 373 F. 2d 633, 634. In *Hellenic Sun,* the time between entry, institution of proceedings, filing of opinion, and entry of the formal order, was 41 days (Appellant's Br. 25). While periods of 176 and 209 days, respectively, were approved in "491", appellant concedes that the approval rested on the ground that most of the delay was attributable to the importer. Nevertheless, a portion of that delay was attributable to government officials. 367 U.S. 903-904. It is conceded also that in *Father Silas* periods of 98 days and 165 days were disapproved (Appellant's Br. 26). In short, appellant's reliance upon the varied rulings of the district courts is self-defeating, it is submitted. The fact is that the customs procedures under the law are necessarily

lengthy, time consuming and subject to the arbitrary and capricious decisions of officials throughout the service. In the case herein, the time consumed from seizure to the date of the Court hearing was 76 days. It was conceded "that under present statutory procedures it could not have been accomplished any sooner." [A. 26].[7] The appellant is not aided by its reliance on the Bureau of Customs Circular (RES-15-RM, July 13, 1966). Under the regulations there contained, the first examination of any material is to be made "as soon as possible after it is available for customs examination." Then, if the first examining customs officer determines "that further review of the material is necessary at the district level," the district delegate must review the material the next day. Whenever, whether upon such first examination or subsequent review, a determination is made as to "hard core" obscenity, an assent to forfeiture shall be solicited. If the assent is not ruled on within one week or declined prior thereto, the material is referred to the United States Attorney's Office immediately. However, if the subsequent review at the district level results in a determination that the material "is probably obscene but there is no clear local, Bureau, or judicial precedent for the determination, or if some other reason exists which makes Bureau review desirable," the material must be forwarded to the Bureau of Customs at Washington, D.C. There

[7]The reference to "Quiet Days In Clichy" (Appellant's Br. 27, fn. 12) does not support appellant's contention. The time between seizure and final determination was about 100 days. Since the film was found to be not obscene, the public's right to access to constitutionally protected material had been denied for over 3 months. Reliance upon *Interstate Circuit* appears misplaced. The time between administrative classification and final determination in the trial court was 9 days, not possible under the customs statute and procedures.

does not appear to be any provision in the Circular with respect to the time provided for the Restricted Merchandise Section in Washington, D.C. to decide whether material "is probably obscene."

The short of the matter is that nothing in the statute, or the legislative history, or the regulations and judicial decisions provide any of the procedural safeguards required by the Constitution and the decisions of the Court. The appellant does not deny that the statute and regulations do not prohibit customs agents from long delaying judicial determination. The discretion vested in the administrative officials, without time limits fixed by the statute or by judicial rule, violates the First Amendment. See, *Freedman v. Maryland,* 380 U.S. 51; *Teitel Film Corp. v. Cusack,* 390 U.S. 139; *Bantam Books v. Sullivan,* 372 U.S. 58.

B. The district court, as heretofore stated, found it unnecessary to reach other issues raised by appellees in support of their claims [A. 25, 26]. Without rejecting the argument, the court passed over appellees' contention that 19 U.S.C. 1305 is unconstitutional because the statute purports to forbid the importation of obscene material even in the absence of any showing that the material is intended for distribution to minors or for distribution in a manner which intrudes upon the sensitivities or privacy of the general public [A. 25]. Appellees contend that the statute is additionally overbroad in the light of the aforesaid, and the discussion of this issue is detailed at length in the brief

for appellees in the companion case herein, *United States v. Reidel*, No. 534.

Appellees also urge the invalidity of the statute because the law purports to vest in customs officials discretion to seize books and other media of expression without an adversary hearing, in violation of the First and Fifth Amendments to the United States Constitution. *Marcus v. Search Warrants of Property*, 367 U.S. 717; *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205; *Lamont v. Postmaster General*, 381 U.S. 301; *United States v. 18 Packages of Magazines*, 238 F. Supp. 846 (D.C. Cal. 1964).

Finally, appellees contend that there is no rational or other factual basis for adult censorship imposed by 19 U.S.C. 1305. The enactment of the statute was based upon unfounded conclusions and premises, and the statute today abridges the exercise of freedoms of speech and press, deprives persons of their liberty and property without due process of law, and denies the equal protection of the laws contrary to the provisions of the First and Fifth Amendments. See, Conclusions and Recommendations of The Report of the Commission on Obscenity and Pornography, September 1970, United States Government Printing Office, 47-64. See also, Justice Black in *Ginzburg v. United States*, 383 U.S. 463, 478-481; Justice Douglas in *Ginzburg v. United States*, 383 U.S. at 483; Justice Harlan in *Memoirs v. Massachusetts*, 383 U.S. 413, 455-456; Justice Stewart in *Jacobellis v. Ohio*, 378 U.S. 184, 197; Chief Justice Warren in *Jacobellis v. Ohio*, 378 U.S. at 200-201;

Per curiam in *Redrup v. New York*, 386 U.S. 767, 770-771.

Conclusion.

For the foregoing reasons the judgment of the District Court should be affirmed.

Respectfully submitted,

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Of Counsel.

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

IN THE

Supreme Court of the United States

October Term 1970
No. 133

UNITED STATES OF AMERICA,

Appellant,

vs.

THIRTY-SEVEN (37) PHOTOGRAPHS, MILTON LUROS, Claimant,

Appellees.

On Appeal From the United States District Court for the Central District of California.

PETITION FOR REHEARING.

Appellees respectfully present this petition for a rehearing based upon the grounds which follow hereinafter.

1. The District Court below held: "Section 1305 is a system of censorship by customs agents and is barren of safeguards." (309 F.Supp. at 38). This Court does not disagree. Justice White in the majority opinion of the Court, states: "As enacted by Congress, § 1305(a) does not contain explicit time limits of the sort required by *Freedman, Teitel,* and *Blount.*" (Slip Opinion, 4). The statute is therefore, on its face, plainly overbroad and clearly invalid under the First Amendment to the United States Constitution. *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58; *Blount v. Rizzi,*

400 U.S. 410; *Aptheker v. Secretary of State,* 378 U.S. 500; *United States v. Robel,* 389 U.S. 258; *Freedman v. Maryland,* 380 U.S. 51.

Instead of declaring the law unconstitutional, and deferring to Congress the enactment of appropriate legislation, the Court chooses "to construe the section to bring it in harmony with constitutional requirements" (Slip Opinion, 5). This action appears contrary to this Court's usual reluctance to engage in the judicial rewriting of overbroad statutes. Ordinarily, when a statute is unconstitutional on its face, it is for the Congress to decide under our constitutional system whether to reenact the statute with the required safeguards. When the Court "rewrites" the statute, it in effect imputes to the legislature an intent to include what the Court believes to be constitutionally compelled limitations. It is submitted that it is more in keeping with the theory of separation of powers for the judiciary to declare a palpably invalid statute unconstitutional, leaving it to the Congress to decide whether, and in what form, the statute should be written and reenacted.

The judicial rewriting of §1305(a) is unjustified, it is submitted, and leads to an unconstitutional result. The chilling effect of the rewritten statute is as great as the statute enacted by Congress. Indeed, the "danger of abridgment of the right of the public in a free society to unobstructed circulation of nonobscene books" (*Quantity of Copies of Books v. Kansas,* 378 U.S. 205, 213) is intensified by the new legislation which the Court has written.

It is stated by the majority opinion that the reading into the section of the time limits which the Court has chosen to impose is "fully consistent with its legislative

purpose" (Slip Opinion, 6). With all deference, nothing in the legislative history of the law reflects an intent of Congress to permit the suppression of expression for a period of 74 days. The quotations from the Congressional record and the language of statutes such as 19 U.S.C. §§1602 and 1604 appear to reflect a deep aversion by members of Congress to any censorship by customs officials and a desire to leave determinations of obscenity solely to courts and juries. The emphasis is constantly on such words as "immediately report" and "prompt determination". There is nothing in the legislative history to justify a conclusion that books, films, photographs, and other media of expression, can be confiscated and suppressed for more than two months before a final judicial determination as to whether the material is constitutionally protected or not. The majority opinion states that the congressional debates never suggested inclusion of time limits, "perhaps because experience had not yet demonstrated a need for them" (Slip Opinion, 8). It is just as reasonable to suppose, perhaps more so, that time limits were not discussed because Congress believed that "immediately" and "promptly" meant exactly that. It cannot be seriously contended, it is submitted, that words like "prompt" and "immediate" are synonymous with a period of 74 days, especially where expression is being suppressed for such a lengthy time period. The statute as rewritten will not, it is submitted, ensure "the necessary sensitivity to freedom of expression which the First Amendment requires". (*Freedman v. Maryland*, 380 U.S. 51, 58)—and with which Congress was concerned.

The majority opinion states that including specific time limits does not require the Court "to decide issues of policy appropriately left to the Congress or raise other

questions upon which Congress possesses special legislative expertise" (Slip Opinion, 8-9). It is stated that, "We possess as much expertise as Congress" in determining the speed with which prosecutors and judges can be expected to function in adjudicating matters under the statute (Slip Opinion, 9). The issue here, however, is not the "speed" with which a prosecutor, court, or jury can act. The basic question is whether expression ordinarily protected by the First Amendment can be suppressed for a period of 74 days before judicial determination. That question, it is submitted, is initially a policy question which appropriately belongs with Congress. It is for Congress to decide in the first place whether suppression for such a period of time by the Customs Bureau and by prosecutors, judges and juries, shall be as extensive as this Court has imposed. Congress will want to hear not only from administrative officials, prosecutors and courts, but it will also want to hear from publishers, distributors, importers and counsel who are required to litigate these matters on their behalf. With deference, therefore, Congress possesses and will possess far more expertise in this ultimate determination of legislative policy than members of the judiciary.

It is indicative of the majority opinion's "angle of vision" that in selecting time periods it fails to adopt the shortest period of time between seizure and final judicial determination, as reflected in the cases, but apparently strikes a compromise position between cases which have sanctioned long delays and those which have sanctioned delays shorter than the period selected by the Court. This is done upon the assumption "that no undue hardship will be imposed upon the Government and the lower federal courts" by fixing 74 days

for the suppression period. It is also stated that the time does not seem "undue" for importers bringing "goods" into this country from abroad (Slip Opinion, 10). Thus, the principal concern appears to be for prosecutors and courts. Importers of books, films, photographs, and other media of expression ordinarily protected by the First Amendment are described merely as importers of "goods". Left entirely unmentioned is the right of access of the public "to forms of the printed word which the State could not constitutionally suppress directly". *Smith v. California,* 361 U.S. 147, 154.

This case does not involve the importation of "goods"; it involves the importation of expression by adult citizens. There has been no ruling that the photographs involved in the case herein are obscene, and the material is presumptively entitled to constitutional protection under the First Amendment. See the dissenting opinion of Justice Marshall (*United States v. Reidel,* Slip Opinion, 2 and fn.) Suppression of First Amendment material for 74 days is, it is submitted, "undue" and plainly inconsistent with the guarantees of the First Amendment. It may be that the "Government" and the "lower federal courts" will not be inconvenienced by a 74-day time limitation, but the First Amendment is a limitation upon all arms of government and its principal concern is with the right of the public to the indispensable guarantees of freedom of speech and press. The majority opinion of the Court has overlooked, it is submitted, these significant considerations.

Moreover, having fixed a lengthy specific time limitation, the Court adds the following statement: "Of course, we do not now decide that these are the only constitutionally permissible time limits." (Slip Opinion,

10). Such a statement only compounds the vagueness and overbreadth of the existing statute and emphasizes the dangers of judicial legislation. The majority opinion states that the Court is "fully cognizant that Congress may re-enact it [§1305(a)] in a new form specifying new time limits, upon whose constitutionality we will then be required to pass" (Slip Opinion, 10). In the constitutional sense, and as a practical matter, it is submitted that a more appropriate result would be to declare the statute unconstitutional in its present form and leave it to Congress in the first place to decide the multifold policy questions involved in the enactment of a customs censorship law in the year 1971.

2.(a) The majority of the Court holds that search and seizure by customs officials of allegedly obscene materials may be upheld even when the purpose of importation is solely for private use. It appears that a "border" seizure of materials which an adult citizen is indisputably bringing home from abroad for his private consumption is without protection under the First Amendment and the decision of the Court in *Stanley*. As Justice Stewart stated: "If the Government can constitutionally take the book away from him as he passes through customs, then I do not understand the meaning of *Stanley v. Georgia*, 394 U.S. 557." (Slip Opinion). Appellees submit that if an adult citizen has a right to possess explicit sexual materials in his home, he has a right to acquire such materials both in this country and abroad and bring the materials home. The Government cannot present any legitimate justification for intruding upon such right. We deal here with expression, not gambling paraphernalia or other contraband. The ordinary rules with respect to "border" searches and seizures are inapplicable to material or-

dinarily protected by the First Amendment. *Smith v. California,* 361 U.S. 147; *Marcus v. Search Warrants of Property,* 367 U.S. 717; *Quantity of Copies of Books v. Kansas,* 378 U.S. 205.

Moreover, even if *Stanley* be reduced to no more than a decision involving "privacy", the majority opinion is difficult to comprehend, it is submitted. Clearly, "privacy" in the constitutional sense cannot be equated merely with an area known as "home". Privacy is more than a mere structural concept. The zone of privacy surrounds a man not only in his bedroom, but even in the street. It is a claim by an adult citizen to individual autonomy, dignity and integrity. It is a right to be left alone; a protection for adults in their beliefs, their thoughts, their emotions, and their sensations. Privacy does not simply mean privacy in one's home. The right of privacy includes the right to make choices, the right to select from competing ideas, entertainments, propaganda and philosophies, those which an adult citizen believes appropriate for the development of his own character and integrity.

(b) The majority opinion, pointing to the decision in *United States v. Reidel,* holds that §1305(a) is also valid as applied to the importation of explicit sexual materials where such materials are to be distributed solely to willing adults, not designed or intended for minors, and not obtrusively forced upon unwilling recipients. It is submitted that the majority opinion is inconsistent with the demands of the First Amendment and the fundamental constitutional principles enunciated in *Stanley*. The details of the arguments against the conclusions of the majority opinion in the case herein are set forth in appellee's petition for rehearing in *United States v. Reidel.* Appellees have never denied

the power of Government to prohibit, under appropriate standards, the dissemination of explicit sexual materials to minors or the obtrusive dissemination of such materials to unwilling recipients. The position of appellees is that *Roth* and the decisions which followed *Roth*, including *Stanley*, recognize a First Amendment right in adult citizens to read and view materials for their own intellectual and emotional satisfactions, and that such fundamental right includes the unfettered right to acquire the materials. The position of appellees is that the Government has never presented, and cannot present, a legitimate justification for the impairment of an adult citizen's right to obtain for his private consumption explicit sexual materials. The Government's interest in protecting minors can be amply maintained by the enactment of specific legislation. Adult citizens should not be reduced to reading and viewing in private contexts material solely fit for children.

Conclusion.

For all the foregoing reasons, the petition for rehearing should be granted and the judgment of the District Court affirmed.

Respectfully submitted,

STANLEY FLEISHMAN,
Attorney for Appellees.

SAM ROSENWEIN,
Of Counsel.

Attorney's Certificate of Good Faith.

The undersigned Stanley Fleishman, attorney for appellees, hereby certifies that the petition for rehearing filed in this cause is presented in good faith, that in his judgment the grounds of said petition are well taken and in conformance with the Court's Rules and that said petition for rehearing is not interposed for delay.

STANLEY FLEISHMAN,
Attorney for Appellees.

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* THIRTY-SEVEN (37) PHOTOGRAPHS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 133. Argued January 20, 1971—Decided May 3, 1971

Customs agents seized as obscene photographs possessed by claimant Luros when he returned to this country from Europe on October 24, 1969. Section 1305 (a) of 19 U. S. C., pursuant to which the agents acted, prohibits the importation of obscene material, provides for its seizure at any customs office and retention pending the judgment of the district court, and specifies that the collector of customs give information of the seizure to the district attorney, who shall institute forfeiture proceedings. The agents referred the matter to the United States Attorney, who brought forfeiture proceedings on November 6. Luros' answer denied that the photographs were obscene and counterclaimed that § 1305 (a) was unconstitutional. He asked for a three-judge court, which on November 20 was ordered to be convened. Following a hearing on January 9, 1970, the court on January 27 held § 1305 (a) unconstitutional on the grounds that the statute (1) failed to meet the procedural requirements of *Freedman* v. *Maryland*, 380 U. S. 1, and (2) was overly broad as including within its ban obscene material for private use, making it invalid under *Stanley* v. *Georgia*, 394 U. S. 557. *Held:* The judgment is reversed and the case remanded. Pp. 3– .

309 F. Supp. 36, reversed and remanded.

MR. JUSTICE WHITE, joined by THE CHIEF JUSTICE, MR. JUSTICE HARLAN, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE BLACKMUN, concluded in Part I that § 1305 (a) can be construed as requiring administrative and judicial action within specified time limits that will avoid the constitutional issue that would otherwise be presented by *Freedman, supra*. Pp. 3–11.

Syllabus

(a) In *Freedman*, unlike the situation here, the statute failing to specify time limits was enacted pursuant to state authority and could not be given an authoritative construction by this Court to avoid the constitutional issue. P. 5.

(b) The reading into § 1305 (a) of the time limits required by *Freedman*, comports with the legislative purpose of the statute and furthers the policy of statutory construction to avoid a constitutional issue. Pp. 6–9.

(c) Section 1305 (a) may be constitutionally applied as construed to require intervals of no longer than 14 days from seizure of the goods to the institution of judicial proceedings for their forfeiture and no longer than 60 days from the filing of the action to final decision in the district court (absent claimant-induced delays). Pp. 9–10.

MR. JUSTICE WHITE, joined by THE CHIEF JUSTICE, MR. JUSTICE BRENNAN, and MR. JUSTICE BLACKMUN, concluded in Part II that Congress' constitutional power to remove obscene materials from the channels of commerce is unimpaired by this Court's decision in *Stanley, supra*. Cf. *United States* v. *Reidel, ante*, p. —. Pp. 11–13.

MR. JUSTICE HARLAN concluded that Luros, who stipulated with the Government that the materials were imported for commercial purposes, lacked standing to challenge the statute for overbreadth on the ground that it applied to importation for private use. P. 2.

MR. JUSTICE STEWART, while agreeing that the First Amendment does not prevent the border seizure of obscene materials imported for commercial dissemination and that *Freedman* v. *Maryland*, 380 U. S. 1, imposes time limits for initiating forfeiture proceedings and completing the judicial obscenity determination, would not even intimate that the Government may lawfully seize literature intended for the importer's purely private use. P. 1.

WHITE, J., announced the Court's judgment and delivered an opinion in which (as to Part I) BURGER, C. J., and HARLAN, BRENNAN, STEWART, and BLACKMUN, JJ., joined, and in which (as to Part II), BURGER, C. J., and BRENNAN and BLACKMUN, JJ., joined. HARLAN, J., filed an opinion concurring in the judgment and concurring in Part I of WHITE, J.'s opinion. STEWART, J., filed an opinion concurring in the judgment and concurring in Part I of WHITE, J.'s opinion. BLACK, J., filed a dissenting opinion, in which DOUGLAS, J., joined. MARSHALL, J., filed a dissenting opinion, see No. 534, *United States* v. *Reidel*.

SUPREME COURT OF THE UNITED STATES

No. 133.—October Term, 1970

United States, Appellant, *v.* Thirty-Seven (37) Photographs, Milton Luros, Claimant.	On Appeal From the United States District Court for the Central District of California.

[May 3, 1971]

Mr. Justice White announced the judgment of the Court and an opinion in which The Chief Justice, Mr. Justice Brennan, and Mr. Justice Blackmun join.*

When Milton Luros returned to the United States from Europe on October 24, 1969, he brought with him in his luggage the 37 photographs here involved. United States customs agents, acting pursuant to 19 U. S. C. § 1305 (a),[1]

*Mr. Justice Harlan and Mr. Justice Stewart also join Part I of the opinion.

[1] 19 U. S. C. § 1305 (a) provides in pertinent part:

"All persons are prohibited from importing into the United States from any foreign country . . . any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral . . . . No such articles whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the collector that the obscene or other prohibited articles contained in the package were inclosed therein without the knowledge or consent of the importer, owner, agent, or consignee, the entire contents of the package in which such articles are contained, shall be subject to seizure and forfeiture as hereinafter provided: . . . *Provided, further,* That the Secretary of the Treasury

seized the photographs as obscene. They referred the matter to the United States Attorney, who on November 6 instituted proceedings in the United States District Court for forfeiture of the material. Luros, as claimant, answered, denying the photographs were obscene and setting up a counterclaim alleging the unconstitutionality of § 1305 (a) on its face and as applied to him. He demanded that a three-judge court be convened to issue an injunction prayed for in the counterclaim. The parties stipulated a time for hearing the three-judge court motion. Formal order convening the court was entered on November 20. The parties then stipulated a briefing schedule expiring on December 16. The court ordered a hearing for January 9, also suggesting the parties stipulate facts, which they did. The stipulation revealed, among other things, that some or all of the

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may, in his discretion, admit the so-called classics or books of recognized and established literary or scientific merit, but may, in his discretion, admit such classics or books only when imported for noncommercial purposes.

"Upon the appearance of any such book or matter at any customs office, the same shall be seized and held by the collector to await the judgment of the district court as hereinafter provided; and no protest shall be taken to the United States Customs Court from the decision of the collector. Upon the seizure of such book or matter the collector shall transmit information thereof to the district attorney of the district in which is situated the office at which such seizure has taken place, who shall institute proceedings in the district court for the forfeiture, confiscation, and destruction of the book or matter seized. Upon the adjudication that such book or matter thus seized is of the character the entry of which is by this section prohibited, it shall be ordered destroyed and shall be destroyed. Upon adjudication that such book or matter thus seized is not of the character the entry of which is by this section prohibited, it shall not be excluded from entry under the provisions of this section.

"In any such proceeding any party in interest may upon demand have the facts at issue determined by a jury and any party may have an appeal or the right of review as in the case of ordinary actions or suits."

37 photographs were intended to be incorporated in a hard cover edition of The Kama Sutra of Vatsyayana, a widely distributed book candidly describing a large number of sexual positions. Hearing was held as scheduled on January 9, and on January 27 the three-judge court filed its judgment and opinion declaring § 1305 (a) unconstitutional and enjoining its enforcement against the 37 photographs, which were ordered returned to Luros. 309 F. Supp. 36 (CD Cal. 1970). The judgment of invalidity rested on two grounds: first, that the section failed to comply with the procedural requirements of *Freedman* v. *Maryland*, 380 U. S. 51 (1965), and second, that under *Stanley* v. *Georgia*, 394 U. S. 557 (1969), § 1305 (a) could not validly be applied to the seized material. We shall deal with each of these grounds separately.

I

In *Freedman* v. *Maryland*, *supra*, we struck down a state scheme for administrative licensing of motion pictures, holding "that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." 380 U. S., at 58. To insure that a judicial determination occurs promptly so that administrative delay does not in itself become a form of censorship, we further held, (1) there must be assurance, "by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film"; (2) "[a]ny restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution"; and (3) ". . . the procedure must also assure a prompt final

judicial decision" to minimize the impact of possibly erroneous administrative action. *Id.*, at 58–59.

Subsequently, we invalidated Chicago's motion picture censorship ordinance because it permitted an unduly long administrative procedure before the invocation of judicial action and also because the ordinance, although requiring prompt resort to the courts after administrative decision and an early hearing, did not assure "a prompt judicial decision of the question of the alleged obscenity of the film." *Teitel Film Corp.* v. *Cusack*, 390 U. S. 139, 141 (1968). So too in *Blount* v. *Rizzi*, 400 U. S. 410 (1971), we held unconstitutional certain provisions of the postal laws designed to control use of the mails for commerce in obscene materials. Under those laws an administrative order restricting use of the mails could become effective without judicial approval, the burden of obtaining prompt judicial review was placed upon the user of the mails rather than the Government, and the interim judicial order, which the Government was permitted, though not required to obtain pending completion of administrative action, was not limited to preserving the status quo for the shortest fixed period compatible with sound judicial administration.

As enacted by Congress, § 1305 (a) does not contain explicit time limits of the sort required by *Freedman*, *Teitel*, and *Blount*.[2] These cases do not, however, re-

[2] The United States urges that we find time limits in 19 U. S. C. §§ 1602 and 1604. Section 1602 provides that customs agents who seize goods must "report every such seizure immediately" to the collector of the district, while § 1604 provides that, once a case has been turned over to a United States Attorney, it shall be his duty "immediately to inquire into the facts" and "forthwith to cause the proper proceedings to be commenced and prosecuted, without delay," if he concludes judicial proceedings are appropriate. We need not decide, however, whether §§ 1602 and 1604 can properly be applied to cure the invalidity of § 1305 (a), for even if they were applicable, they would not provide adequate time limits and would not

quire that we pass upon the constitutionality of § 1305 (a), for it is possible to construe the section to bring it in harmony with constitutional requirements. It is true that we noted in *Blount* that "it is for Congress, not this Court, to rewrite the statute," 400 U. S., at 419, and that we similarly refused to rewrite Maryland's statute and Chicago's ordinance in *Freedman* and *Teitel*. On the other hand, we must remember that, "[w]hen the validity of an act of Congress is drawn in question, and . . . a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932). Accord, *e. g.*, *Haynes* v. *United States*, 390 U. S. 85, 92 (1968) (dictum); *Schneider* v. *Smith*, 390 U. S. 17, 27 (1968); *United States* v. *Rumely*, 345 U. S. 41, 45 (1953); *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 348 (1936) (Brandeis, J., concurring). This cardinal principle did not govern *Freedman*, *Teitel*, and *Blount* only because the statutes there involved could not be construed so as to avoid all constitutional difficulties.

The obstacle in *Freedman* and *Teitel* was that the statutes were enacted pursuant to state rather than federal authority; while *Freedman* recognized that a statute which failed to specify time limits could be saved by judicial construction, it held that such construction had to be "authoritative," 380 U. S., at 59, and we lack

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cure its invalidity. The two sections contain no specific time limits, nor do they require the collector to act promptly in referring a matter to the United States Attorney for prosecution. Another flaw is that § 1604 requires that, if the United States Attorney declines to prosecute, he must report the facts to the Secretary of the Treasury for his direction, but the Secretary is under no duty to act with speed. The final flaw is that neither section requires the District Court in which a case is commenced to come promptly to a final decision.

jurisdiction authoritatively to construe state legislation. Cf. *General Trading Co.* v. *State Tax Comm'n*, 322 U. S. 335, 337 (1944). In *Blount*, we were dealing with a federal statute and thus had power to give it an authoritative construction; salvation of that statute, however, would have required its complete rewriting in a manner inconsistent with the expressed intentions of some of its authors. For the statute at issue in *Blount* not only failed to specify time limits within which judicial proceedings must be instituted and completed; it also failed to give any authorization at all to the administrative agency, upon a determination that material was obscene, to seek judicial review. To have saved the statute we would thus have been required to give such authorization and to create mechanisms for carrying it into effect, and we would have had to do this in the face of legislative history indicating that the Postmaster General, when he had testified before Congress, had expressly sought to forestall judicial review pending completion of administrative proceedings. See 400 U. S., at 420 n. 8.

No such obstacles confront us in construing § 1305 (a). In fact, the reading into the section of the time limits required by *Freedman* is fully consistent with its legislative purpose. When the statute, which in its present form dates back to 1930, was first presented to the Senate, concern immediately arose that it did not provide for determinations of obscenity to be made by courts rather than administrative officers and that it did not require that judicial rulings be obtained promptly. In language strikingly parallel to that of the Court in *Freedman*, Senator Walsh protested against the "attempt to enact a law that would vest an administrative officer with power to take books and confiscate them and destroy them, because, in his judgment, they were obscene or indecent," and urged that the law "oblige him to go into court and file his information there, . . . and have

it determined in the usual way, the same as every other crime is determined." 72 Cong. Rec. 5419. Senator Wheeler likewise could not "conceive how any man" could "possibly object" to an amendment to the proposed legislation that required a customs officer, if he concluded material was obscene, to "turn . . . it over to the district attorney, and the district attorney prosecutes the man, and he has a right of trial by jury in that case." 71 Cong. Rec. 4466. Other Senators similarly indicated their aversion to censorship "by customs clerks and bureaucratic officials," *id.*, at 4437 (remarks of Senator Dill), preferring that determinations of obscenity should be left to courts and juries. See, *e. g.*, *id.*, at 4433–4439, 4448, 4452–4459; 72 Cong. Rec. 5417–5423, 5492, 5497. Senators also expressed the concern later expressed in *Freedman* that judicial proceedings be commenced and concluded promptly. Speaking in favor of another amendment, Senator Pittman noted that a customs officer seizing obscene matter "should *immediately* report to the nearest United States district attorney having authority under the law to proceed to confiscate . . . ." *Id.*, at 5420 (emphasis added). Commenting on an early draft of another amendment that was ultimately adopted, Senator Swanson noted that officers would be required to go to court "immediately." *Id.*, at 5422. Then he added:

> "The *minute* there is a suspicion on the part of a revenue or customs officer that a certain book is improper to be admitted into this country, he presents the matter to the district court, and there will be a *prompt* determination of the matter by a decision of that court." *Id.*, at 5424 (emphasis added).

Before it finally emerged from Congress, § 1305 (a) was amended in response to objections of the sort voiced above: it thus reflects the same policy considerations that induced this Court to hold in *Freedman* that censors

must resort to the courts "within a specified brief period" and that such resort must be followed by "a prompt final judicial decision . . . ." 380 U. S., at 59. Congress' sole omission was its failure to specify exact time limits within which resort to the courts must be had and judicial proceedings be completed. No one during the congressional debates ever suggested inclusion of such limits, perhaps because experience had not yet demonstrated a need for them. Since 1930, however, the need has become clear. Our researches have disclosed cases sanctioning delays of as long as 40 days and even six months between seizure of obscene goods and commencement of judicial proceedings. See *United States* v. *77 Cartons of Magazines*, 300 F. Supp. 851 (ND Cal. 1969); *United States* v. *One Carton Positive Motion Picture Film Entitled "491,"* 247 F. Supp. 450 (SDNY 1965), rev'd on other grounds, 367 F. 2d 889 (CA2 1966). Similarly, we have found cases in which completion of judical proceedings has taken as long as three, four, and even seven months. See *United States* v. *Ten Erotic Paintings*, 311 F. Supp. 884 (Md. 1970); *United States* v. *35 MM Color Motion Picture Film Entitled "Language of Love,"* 311 F. Supp. 108 (SDNY 1970); *United States* v. *One Carton Positive Motion Picture Film Entitled "491," supra.* We conclude that to sanction such delays would be clearly inconsistent with the concern for promptness that was so frequently articulated during the course of the Senate's debates, and that fidelity to Congress' purpose dictates that we read explicit time limits into the section. The only alternative would be to hold § 1305 (a) unconstitutional in its entirety, but Congress has explicitly directed that the section not be invalidated in its entirety merely because its application to some persons be adjudged unlawful. See 19 U. S. C. § 1652. Nor does the construction of § 1305 (a) to include specific time limits require us to decide issues of policy appropriately

left to the Congress or raise other questions upon which Congress possesses special legislative expertise, for Congress has already set its course in favor of promptness and we possess as much expertise as Congress in determining the sole remaining question—that of the speed with which prosecutorial and judicial institutions can, as a practical matter, be expected to function in adjudicating § 1305 (a) matters. We accordingly see no reason for declining to specify the time limits which must be incorporated into § 1305 (a)—a specification that is fully consistent with congressional purpose and that will obviate the constitutional objections raised by appellee. Indeed, we conclude that the legislative history of the section and the policy of giving legislation a saving construction in order to avoid decision of constitutional questions requires that we undertake this task of statutory construction.

We begin by examining cases in the lower federal courts in which proceedings have been brought under § 1305 (a). That examination indicates that in many of the cases which have come to our attention the Government in fact instituted forfeiture proceedings within 14 days of the date of seizure of the allegedly obscene goods, see *United States* v. *Reliable Sales Co.*, 376 F. 2d 803 (CA4 1967); *United States* v. *1,000 Copies of a Magazine Entitled "Solis,"* 254 F. Supp. 595 (Md. 1966); *United States* v. *56 Cartons Containing 19,500 Copies of a Magazine Entitled "Hellenic Sun,"* 253 F. Supp. 498 (Md. 1966), aff'd, 373 F. 2d 635 (CA4 1967); *United States* v. *392 Copies of a Magazine Entitled "Exclusive,"* 253 F. Supp. 485 (Md. 1966); and judicial proceedings were completed within 60 days of their commencement. See *United States* v. *Reliable Sales Co., supra; United States* v. *1,000 Copies of a Magazine Entitled "Solis," supra; United States* v. *56 Cartons Containing 19,500 Copies of a Magazine Entitled "Hellenic Sun," supra; United States* v. *392 Copies of a*

Magazine Entitled "Exclusive," supra; United States v. *127,295 Copies of Magazines, More or Less*, 295 F. Supp. 1186 (Md. 1968). Given this record, it seems clear that no undue hardship will be imposed upon the Government and the lower federal courts by requiring that forfeiture proceedings be commenced within 14 days and completed within 60 days of their commencement, nor does a delay of as much as 74 days seem undue for importers engaged in the lengthy process of bringing goods into this country from abroad. Accordingly, we construe § 1305 (a) to require intervals of no more than 14 days from seizure of the goods to the institution of judicial proceedings for their forfeiture and no longer than 60 days from the filing of the action to final decision in the District Court. No seizure or forfeiture will be invalidated for delay, however, where the claimant is responsible for extending either administrative action or judicial determination beyond the allowable time limits or where administrative or judicial proceedings are postponed pending the consideration of constitutional issues appropriate only for a three-judge court.

Of course, we do not now decide that these are the only constitutionally permissible time limits. We note, furthermore, that constitutionally permissible limits may vary in different contexts; in other contexts, such as a claim by a state censor that a movie is obscene, the Constitution may impose different requirements with respect to the time between the making of the claim and the institution of judicial proceedings or between their commencement and completion than in the context of a claim of obscenity made by customs officials at the border. We decide none of these questions today. We do nothing in this case but construe § 1305 (a) in its present form, fully cognizant that Congress may re-enact it in a new form specifying new time limits, upon whose constitutionality we will then be required to pass.

So construed, § 1305 (a) may constitutionally be applied to the case before us. Seizure in the present case took place on October 24 and forfeiture proceedings were instituted on November 6—a mere 13 days after seizure. Moreover, decision on the obscenity of Luros' materials might well have been forthcoming within 60 days had petitioner not challenged the validity of the statute and caused a three-judge court to be convened. We hold that proceedings of such brevity fully meet the constitutional standards set out in *Freedman*, *Teitel*, and *Blount*. Section 1305 (a) accordingly may be applied to the 37 photographs, providing that on remand the obscenity issue is resolved in the District Court within 60 days, excluding any delays caused by Luros.

II

We next consider Luros' second claim, which is based upon *Stanley* v. *Georgia*, *supra*. On the authority of *Stanley*, Luros urged the trial court to construe the First Amendment as forbidding any restraints on obscenity except where necessary to protect children or where it intruded itself upon the sensitivity or privacy of an unwilling adult. Without rejecting this position, the trial court read *Stanley* as protecting, at the very least, the right to read obscene material in the privacy of one's own home and to receive it for that purpose. It therefore held that § 1305 (a), which bars the importation of obscenity for private use as well as for commercial distribution, is overbroad and hence unconstitutional.[3]

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[3] The District Court's opinion is not entirely clear. The court may have reasoned that Luros had a right to import the 37 photographs in question for planned distribution to the general public, but our decision today in *United States* v. *Reidel*, *ante*, makes it clear that such reasoning would have been in error. On the other hand, the District Court may have reasoned that, while Luros had no right to import the photographs for redistribution,

The trial court erred in reading *Stanley* as immunizing from seizure obscene materials possessed at a port of entry for the purpose of importation for private use. In *United States* v. *Reidel, ante,* we have today held that Congress may constitutionally prevent the mails from being used for distributing pornography. In this case, neither Luros nor his putative buyers have rights which are infringed by the exclusion of obscenity from incoming foreign commerce. By the same token, obscene materials may be removed from the channels of commerce when discovered in the luggage of a returning foreign traveler even though intended solely for his private use. That the private user under *Stanley* may not be prosecuted for possession of obscenity in his home does not mean that he is entitled to import it from abroad free from the power of Congress to exclude noxious articles from commerce. *Stanley*'s emphasis was on the freedom of thought and mind in the privacy of the home. But a port of entry is not a traveler's home. His right to be let alone neither prevents the search of his luggage nor the seizure of unprotected, but illegal, materials when his possession of them is discovered during such a search. Customs officers characteristically inspect luggage and their power to do so is not questioned in this case; it is an old practice and is intimately associated with excluding illegal articles from the country. Whatever the scope of the right to receive obscenity adumbrated in *Stanley,*

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a person would have a right under *Stanley* to import them for his own private use and that § 1305 (a) was therefore void as overbroad because it prohibits both sorts of importation. If this was the Court's reasoning, the proper approach, however, was not to invalidate the section in its entirety, but to construe it narrowly and hold it valid in its application to *Luros*. This was made clear in *Dombrowski* v. *Pfister,* 380 U. S. 479, 491–492 (1965), where the Court noted that, once the overbreath of a statute has been sufficiently dealt with, it may be applied to prior conduct foreseeably within its valid sweep.

that right, as we said in Reidel, does not extend to one who is seeking, as was Luros here, to distribute obscene materials to the public, nor does it extend to one seeking to import obscene materials from abroad, whether for private use or public distribution. As we held in *Roth* v. *United States*, 354 U. S. 476 (1957), and reiterated today in *Reidel, ante*, obscenity is not within the scope of first amendment protection. Hence Congress may declare it contraband and prohibit its importation, as it has elected in § 1305 (a) to do.

The judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 133.—October Term, 1970

United States, Appellant, *v.* Thirty-Seven (37) Photographs, Milton Luros, Claimant.	On Appeal From the United States District Court for the Central District of California.

[May 3, 1971]

Mr. Justice Harlan, concurring in the judgment and in Part I of Mr. Justice White's opinion.

I agree, for the reasons set forth in Part I of Mr. Justice White's opinion, that this statute may and should be construed as requiring administrative and judicial action within specified time limits that will avoid the constitutional issue that would otherwise be presented by *Freedman* v. *Maryland*, 380 U. S. 51 (1965). Our decision today in *United States* v. *Reidel*, *ante*, p. —, forecloses Luros' claim that the Government may not prohibit the importation of obscene materials for commercial distribution.

Luros also attacked the statute on its face as overbroad because of its apparent prohibition of importation for private use. A statutory scheme purporting to proscribe only importation for commercial purposes would certainly be sufficiently clear to withstand a facial attack on the statute based on the notion that the line between commercial and private importation is so unclear as to inhibit the alleged right to import for private use. Cf. *Breard* v. *Alexandria*, 341 U. S. 622 (1951). It is incontestable that 19 U. S. C. § 1305 (a) (1964) is intended to cover at the very least importation of obscene materials for commercial purposes. See n. 1 of Mr. Justice White's opinion. Since the parties stipulated that the materials

were imported for commercial purposes, Luros cannot claim that his primary conduct was not intended to be within the statute's sweep. Cf. *Dombrowski* v. *Pfister*, 380 U. S. 479, 491–492 (1965). Finally, the statute includes a severability clause. 19 U. S. C. § 1652.

Thus it is apparent that we could only narrow the statute's sweep to commercial importation, were we to determine that importation for private use is constitutionally privileged. In these circumstances, the argument that Luros should be allowed to raise the question of constitutional privilege to import for private use, in order to protect the alleged First Amendment rights of private importers of obscenity from the "chilling effects" of the statute's presence on the books, seems to me to be clearly outweighed by the policy that the resolution of constitutional questions should be avoided where not necessary to the decision of the case at hand.

I would hold that Luros lacked standing to raise the overbreadth claim. See Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 910 (1970).

On the foregoing premises I join Part I of the Court's opinion and as to Part II, concur in the judgment.*

*Again, as in *United States* v. *Reidel*, *supra*, the obscenity *vel non* of the seized materials is not presented at this juncture of the case.

SUPREME COURT OF THE UNITED STATES

No. 133.—October Term, 1970

United States, Appellant, *v.* Thirty-Seven (37) Photographs, Milton Luros, Claimant.	On Appeal From the United States District Court for the Central District of California.

[May 3, 1971]

Mr. Justice Stewart, concurring in the judgment and in Part I of Mr. Justice White's opinion.

I agree that the First Amendment does not prevent the border seizure of obscene materials sought to be imported for commercial dissemination. For the reasons expressed in Part I of Mr. Justice White's opinion, I also agree that *Freedman* v. *Maryland*, 380 U. S. 1, requires that there be time limits for the initiation of forfeiture proceedings and for the completion of the judicial determination of obscenity.

But I would not in this case decide, even by way of dicta, that the Government may lawfully seize literary material intended for the purely private use of the importer.[1] The terms of the statute appear to apply to an American tourist who, after exercising his constitutionally protected liberty to travel abroad,[2] returns home with a single book in his luggage, with no intention of selling it or otherwise using it, except to read it. If the Government can constitutionally take the book away from him as he passes through customs, then I do not understand the meaning of *Stanley* v. *Georgia*, 394 U. S. 557.

[1] As Mr. Justice White's opinion correctly says, even if seizure of material for private use is unconstitutional, the statute can still stand in appropriately narrowed form, and the seizure in this case clearly falls within the valid sweep of such a narrowed statute. *Ante*, at —, n. 2.

[2] *Aptheker* v. *Secretary of State*, 378 U. S. 500.

SUPREME COURT OF THE UNITED STATES

Nos. 133 AND 534.—OCTOBER TERM, 1970

United States, Appellant, 133 *v.* Thirty-Seven (37) Photographs, Milton Luros, Claimant. United States, Appellant, 534 *v.* Norman George Reidel.	On Appeal From the United States District Court for the Central District of California.

[May 3, 1971]

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, dissenting.

I

I dissent from the judgments of the Court for the reasons stated in many of my prior opinions. See, *e. g.*, *Smith* v. *California*, 361 U. S. 147, 155 (1959) (BLACK, J., concurring); *Ginzburg* v. *United States*, 383 U. S. 463, 476 (1966) (BLACK, J., dissenting). In my view the First Amendment denies Congress the power to act as censor and determine what books our citizens may read and what pictures they may watch.

I particularly regret to see the Court revive the doctrine of *Roth* v. *United States*, 354 U. S. 476 (1957), that "obscenity" is speech for some reason unprotected by the First Amendment. As the Court's many decisions in this area demonstrate, it is extremely difficult for judges or any other citizens to agree on what is "obscene." Since the distinctions between protected speech and "obscenity" are so elusive and obscure almost every "obscenity" case involves difficult constitutional issues. After *Roth* our docket and those of other courts have constantly

been crowded with cases where judges are called upon to decide whether a particular book, magazine, or movie may be banned. I have expressed before my view that I can imagine no task for which this Court of lifetime judges is less equipped to deal. *Smith* v. *California, supra,* (BLACK, J., dissenting).

In view of the difficulties with the *Roth* approach, it is not surprising that many recent decisions have at least implicitly suggested that it should be abandoned. See *Stanley* v. *Georgia,* 394 U. S. 557 (1969); *Redrup* v. *New York,* 386 U. S. 767 (1967). Despite the proven shortcomings of *Roth,* the majority today reaffirms the validity of that dubious decision. Thus, for the foreseeable future this Court must sit as a Board of Supreme Censors, sifting through books and magazines and watching movies because some official fears they deal too explicitly with sex. I can imagine no more distasteful, useless, and time-consuming task for the members of this Court than perusing this material to determine whether it has "redeeming social value." This absurd spectacle could be avoided if we would adhere to the literal command of the First Amendment that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

II

Wholly aside from my own views of what the First Amendment demands, I do not see how the reasoning of MR. JUSTICE WHITE'S opinion today in *Thirty-Seven Photographs* can be reconciled with the holdings of earlier cases. That opinion insists that the trial court erred in reading *Stanley* v. *Georgia, supra,* "as immunizing from seizure obscene materials possessed at a port of entry for the purpose of importation for private use." *Ante,* at 12. But it is never satisfactorily explained just why the trial court's reading of *Stanley*

was erroneous. It would seem to me that if a citizen had a right to possess "obscene" material in the privacy of his home he should have the right to receive it voluntarily through the mail. Certainly when a man legally purchases such material abroad he should be able to bring it with him through customs to read later in his home. The mere act of importation for private use can hardly be more offensive to others than is private perusal in one's home. The right to read and view any literature and pictures at home is hollow indeed if it does not include a right to carry that material privately in one's luggage when entering the country.

The plurality opinion seems to suggest that *Thirty-Seven Photographs* differs from *Stanley* because "Customs officials characteristically inspect luggage and their power to do so is not questioned in this case . . . ." *Ante*, at 12. But surely this observation does not distinguish *Stanley*, because police frequently search private homes as well, and their power to do so is unquestioned so long as the search is reasonable within the meaning of the Fourth Amendment.

Perhaps, however, the plurality reasons silently that a prohibition against importation of obscene materials for private use is constitutionally permissible because it is necessary to prevent ultimate commercial distribution of obscenity. It may feel that an importer's intent to distribute obscene materials commercially is so difficult to prove that all such importation may be outlawed without offending the First Amendment. A very similar argument was made by the State in *Stanley* when it urged that enforcement of a possession law was necessary because of the difficulties of proving intent to distribute or actual distribution. However, the Court unequivocally rejected that argument because an individual's right to "read or observe what he pleases" is so "fundamental to our scheme of individual liberty." *Id.*, at 568.

Furthermore, any argument that all importation may be banned to stop possible commercial distribution simply ignores numerous holdings of this Court that legislation touching on First Amendment freedoms must be precisely and narrowly drawn to avoid stifling the expression the Amendment was designed to protect. Certainly the Court has repeatedly applied the rule against overbreadth in past censorship cases, as in *Butler* v. *Michigan*, 352 U. S. 380 (1957), where we held that the State could not quarantine "the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence." *Id.*, at 383. Cf. *Thornhill* v. *Alabama*, 310 U. S. 88 (1940); *United States* v. *Robel*, 389 U. S. 258 (1967).

Since the plurality opinion offers no plausible reason to distinguish private possession of "obscenity" from importation for private use, I can only conclude that at least four members of the Court would overrule *Stanley*. Or perhaps in the future that case will be recognized as good law only when a man writes salacious books in his attic, prints them in his basement, and reads them in his living room.

The plurality opinion apears to concede that the customs obscenity statute is unconstitutional on its face after the Court's decision in *Freedman* v. *Maryland*, 380 U. S. 51 (1965), because this law specifies no time limits within which forfeiture proceedings must be started against seized books or pictures, and it does not require a prompt final judicial hearing on obscenity. *Ante*, at 4–5. Once the Court has reached this determination, the proper course would be to affirm the lower court's decision. But the majority goes on to rewrite the statute by adding specific time limits. The Court then notes that the Government here has conveniently stayed within these judicially manufactured limits by one day, and on that premise it concludes the statute may be enforced in

this case. In my view the Court's action in rewriting this statute represents a seizure of legislative power that we simply do not possess under the Constitution.

Certainly appellee Luros has standing to raise the claim that the customs statute's failure to provide for prompt judicial decision renders it unconstitutional. Our previous decisions make clear that such censorship statutes may be challenged on their face as a violation of First Amendment rights "whether or not [a defendant's] conduct could be proscribed by a properly drawn statute." *Freedman* v. *Maryland, supra,* at 56. This is true because of the ". . . danger of tolerating, in the area of the First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." *NAACP* v. *Button,* 371 U. S. 415, 433 (1963). Since this censorship statute is unconstitutional on its face, and appellee has standing to challenge it as such, that should end the case without further ado. But the Court nimbly avoids this result by writing a new censorship statute.

I simply cannot understand how the Court determines it has the power to substitute the new statute for the one that the duly elected representatives of the people have enacted. The majority betrays its uneasiness when it concedes that we specifically refused to undertake any such legislative task in *Freedman, supra,* and in *Blount* v. *Rizzi,* 400 U. S. 410 (1971). After holding the Maryland movie censorship law unconstitutional in *Freedman,* the Court stated:

> "How or whether Maryland is to incorporate the required procedural safeguards in the statutory scheme is, of course, for the State to decide." 380 U. S. 51, at 60.

With all deference, I would suggest that the decision whether and how the customs obscenity law should be

rewritten is a task for the Congress, not this Court. Congress might decide to write an entirely different law, or even decide that the Nation can well live without such a statute.

The Court claims to find power to rewrite the customs obscenity law in the statute's legislative history and in the rule that statutes should be construed to avoid constitutional questions. *Ante*, at 9. I agree, of course, that statutes should be construed to uphold their constitutionality when this can be done without misusing the legislative history and substituting a new statute for the one that Congress has passed. But this rule of construction does not justify the Court's acting like a legislature or one of its committees and redrafting the statute in a manner not supported by the deliberations of Congress nor by our previous decisions in censorship cases.

The Court relies principally on statements made by Senators Swanson and Pittman when the customs obscenity legislation was under discussion on the Senate floor. The defect in the Court's reliance is that the Senators' statements did not refer to the version of the law that was passed by Congress. Senator Pittman, objecting to one of the very first drafts of the law, said:

> "Why would it not protect the public entirely if we were to provide for the seizure as now provided and that the property should be held by the officer seizing, and that he should immediately report to the nearest United States district attorney having authority under the law to proceed to confiscate . . . ." 72 Cong. Rec. 5240.

A few minutes later Senator Walsh of Montana announced he would propose an amendment "that would meet the suggestion made by the Senator from Nevada

[Mr. Pittman] . . ." *Id.*, 5421. As Senator Walsh first presented his amendment it read:

> ". . . Upon the appearance of any such book or other matter at any customs office the collector thereof shall *immediately* transmit information thereof to the district attorney of the district in which such port is situated, who shall *immediately* institute proceedings in the district court for the forfeiture and destruction of the same. . . ." *Ibid.* (Emphasis added.)

Senator Swanson was referring to this *first draft* of the Walsh amendment when he made the remarks cited by the majority that officers would be required to go to court "immediately" and that there would be a "prompt" decision on the matter. *Id.*, at 5422, 5424. But just after Swanson's statement the Walsh amendment was changed on the Senate floor to read as follows:

> ". . . Upon the seizure of such book or matter the *collector shall transmit* information thereof to the district attorney of the district in which is situated the offices at which such seizure has taken place, *who shall institute* proceedings in the district court for the forfeiture, confiscation and destruction of the book or matter seized." *Id.*, at 5424. (Emphasis added.)

Thus the requirement that officers go to court "immediately" was dropped in the second draft of the Walsh amendment, and the language of this second draft was enacted into law. The comments quoted and relied upon by the majority were made with reference to an amendment draft that was not adopted by the Senate and is not now the law. This legislative history just referred to provides no support that I can see for the Court's action today. To the extent that these debates tell us

anything about the Senate's attitude toward prompt judicial review of censorship decisions they show simply that the issue was put before the Senate but that it did not choose to require prompt judicial review.

The majority concedes that in previous censorship cases we have considered the validity of the statutes before us on their face, and we have refused to rewrite them. Although some of these cases did involve state statutes, in *Blount* v. *Rizzi*, 400 U. S. 410 (1971), we specifically declined to attempt to save a federal obscenity mail blocking statute by redrafting it. The Court there plainly declared: "it is for Congress, not this Court, to rewrite the statute." *Id.*, at 419. The Court in its opinion now seeks to distinguish *Blount* because saving the mail block statute by requiring prompt judicial review "would have required its complete rewriting in a manner inconsistent with the expressed intentions of some of its authors." *Ante*, at 5. But the only "expressed intention" cited by the majority to support this argument is testimony by the Postmaster General that he wanted to forestall judicial review pending completion of administrative mail block proceedings. *Ante*, at 6. That insignificant piece of legislative history would have posed no obstacle to the Court's saving the mail blocking statute by requiring prompt judicial review *after* prompt administrative proceedings. Yet the Court in *Blount* properly refused to undertake such a legislative task, just as it did in the cases involving state censorship statutes.

The Court also purports to justify its judicial legislation by pointing to the severability provisions contained in 19 U. S. C. § 1652. It is difficult to see how this distinguishes earlier cases, since the statutes struck down in *Freedman* v. *Maryland* and *Teitel Film* v. *Cusack*, 390 U. S. 139 (1968), also contained severability provisions. See Annotated Code of Maryland, Art. 66A, § 24 (1951), Municipal Code of Chicago § 155–7.4 (1961).

The majority is not entirely clear whether the time limits it imposes stem from the legislative history of the customs law or from the demands of the First Amendment. At one point we are told that 14 days and 60 days are not the "only constitutionally permissible time limits," and that if Congress imposes new rules this would present a new constitutional question. *Ante,* at 10. This strongly suggests the time limits stem from the Court's power to "interpret" or "construe" federal statutes, not from the Constitution. But since the Court's action today has no support in the legislative history or the wording of the statute, it appears much more likely that the time limits are derived from the First Amendment itself. If the Court is really drawing its rules from the First Amendment, I find the process of derivation both peculiar and disturbing. The rules are not derived by considering what the First Amendment demands, but by surveying previously litigated cases and then guessing what limits would not pose an "undue hardship" on the Government and the lower federal courts. *Ante,* at 10. Scant attention is given to the First Amendment rights of persons entering the country. Certainly it gives little comfort to an American bringing a book home to Colorado or Alabama for personal reading to be informed without explanation that a 74-day delay at New York harbor is not "undue." Faced with such lengthy legal proceedings and the need to hire a lawyer far from home, he is likely to be coerced into giving up his First Amendment rights. Thus the whims of customs clerks or the congestion of their business will determine what Americans may read.

I would simply leave this statute as the Congress wrote it and affirm the judgment of the District Court.

I do not understand why the Court feels so free to abandon previous precedents protecting the cherished freedoms of press and speech. I cannot of course believe it is bowing to popular passions and what it per-

ceives to be the temper of the times. As I have said before, "Our Constitution was not written in the sands to be washed away by each wave of new judges blown in by each successive political wind that brings new political administrations into temporary power." *Turner* v. *United States*, 396 U. S. 398, 426 (1970) (BLACK, J., dissenting). In any society there come times when the public is seized with fear and the importance of basic freedoms is easily forgotten. I hope, however, "that in calmer times, when present pressures, passions, and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society." *Dennis* v. *United States*, 341 U. S. 494, 581 (1951) (BLACK, J., dissenting).